The Law Commission

Working Paper No. 99

Land Mortgages

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This Working Paper, completed on 1st August 1986, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

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Land Mortgages

LONDON
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First published 1986

ISBN 0 11 730180 9

THE LAW COMMISSION

File No.

WORKING PAPER No. 99

93-131-34

LAND MORTGAGES

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APPENDIX D: The Local Authorities (Disposal of Mortgages) Regulations 1986.

ABBREVIATIONS

Fisher & Lightwood:	Fisher and Lightwood's Law of Mortgage, 9th ed., (1977).
Megarry & Wade:	Sir Robert Megarry and H.W.R. Wade, The Law of Real Property, 5th ed., (1984).
Ruoff & Roper:	Ruoff & Roper on The Law and Practice of Registered Conveyancing, 4th ed., (1979).
Sykes on Securities:	E.I. Sykes, The Law of Securities (an account of the law pertaining to securities over real and personal property under the laws of the Australian States), 4th ed., (1986).

LAND MORTGAGES

SUMMARY

In this Working Paper the Law Commission examines, as part of its programme for the simplification of conveyancing, the law relating to mortgages of interests in land. The paper considers a number of different possible reforms to the structure of mortgage law and provisionally concludes that all existing methods of mortgaging interests in land should be abolished and replaced by a new sui generis Formal Land Mortgage to be created by statute for use in relation to any interest in land. The paper also examines the rights, duties, protection and remedies of parties to a mortgage, both during the security and in relation to its enforcement, and puts forward a series of provisional proposals for reform. The purpose of the paper is to canvass the widest possible range of views, and comments are invited from all those involved in the mortgaging of interests in land.

The Law Commission is very glad to acknowledge the considerable work, by way of research and writing, in the preparation of this paper undertaken by Alison Clarke B.A., Solicitor and Lecturer in Law, whilst on secondment to the Commission for the purpose from the University of Southampton.

PART 1: INTRODUCTION

1.1 The English law of land mortgages is notoriously difficult. It has never been subjected to systematic statutory reform, and over several centuries of gradual evolution it has acquired a multi-layered structure that is historically fascinating but inappropriately and sometimes unnecessarily complicated. The desirability of reform has been recognised for some years. The Royal Commission on Legal Services proposed in 1979 that the Law Commission should consider the simplification and standardisation of mortgage forms[1] and in our 15th Annual Report in 1979-80 we recommended that this should form part of a major review of the law of mortgages.[2]

1.2 For several reasons, this long acknowledged need for reform is threatening to acquire an increased

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1 Final Report, Cmnd. 7648, Annex 21.1. para. 14.

2 Law Com. No.107, para.15: "We have long held the view that the law of mortgages is ripe for reform and we would like to deal with the proposals of the Royal Commission in the course of a review of the whole law in that area. Subject to further consideration when the time comes, we would like to make this a priority when resources permit."

urgency. The most obvious and important reason is the increase in home ownership. By the end of 1984 (the latest year for which figures are available) there were 13½ million owner-occupied dwellings in the United Kingdom, which was 61% of the total housing stock: the corresponding figure for 1950 was just over 4 million dwellings, representing 29% of the housing stock at that time[3]. The rate of increase has accelerated since 1979, partly because of the introduction and extension of statutory rights for public sector tenants to buy their rented dwellings.[4] Virtually all of this increase in home ownership has been financed by borrowed money secured by mortgages. No precise figures are available, but at a rough estimate in 1985 there were between 7½ and 8 million dwellings in the

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3 Social Trends No. 16 (1986) Central Statistical Office p. 133.

4 Introduced by Housing Act 1980 Part I; see now Housing Act 1985. The effect of the Housing Acts on the increase in home ownership is analysed in Social Trends No. 16 at p. 140 and Table 8.14.

United Kingdom which were subject to one or more mortgages.[5] This emergence and growth of what Lord Diplock described as "a real-property-mortgaged-to-a-building-society-owning democracy"[6] has a number of implications for mortgage law. First, the sheer number of mortgages now subsisting at any one time magnifies the importance of every defect in the law. Any unsatisfactory feature of mortgage law now affects a large number of people even if it arises in only a tiny proportion of cases. Secondly, many mortgagors have

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5 The General Household Survey, (1983) Office of Population Censuses and Surveys, indicates that in 1983 in Great Britain 33% of all households, or 58% of owner-occupier households, owned with the help of at least one mortgage (Table 6.1). Applying this 1983 figure of 58% owner-occupation with a mortgage to the 1984 figure of 13½ million owner-occupied dwellings, we arrive at 7.8 million dwellings subject to one or more mortgages. Clearly, it would be unwise to place too much reliance upon such a rough estimate - the 1983 figures are based upon a relatively small sample (under 10,000 households) and no attempt is made to account for regional variations in patterns of owner-occupation or for the ownership of more than one home. However, as the Building Societies Association Building Society Fact Book 1986 shows the mortgage market has remained buoyant throughout 1984 and 1985 (Chapter 5) and in 1985 53% of mortgages went to first-time buyers. This would suggest that the number of dwellings owned subject to one or more mortgages has increased since 1983/1984.

6 In Pettit v. Pettit [1970] A.C. 777 at p. 824.

little or no previous knowledge or experience of mortgage law, and ought to be given an explanation of the rights and obligations acquired as a result of creating a mortgage. The artificiality and complexity of our existing mortgage law make it unlikely that they will receive one. They certainly will not be enlightened by reading the mortgage documents: in 1904 Lord Macnaghten said:

> "no one, I am sure, by the light of nature ever understood an English mortgage of real estate"[7]

and even today it is virtually impossible to draft a mortgage deed that gives a layman any idea of the consequences of entering a mortgage.[8] Nor will all mortgagors receive a full and comprehensible explanation from their professional advisers; the price that most purchasers are able and willing to pay for conveyancing does not (and should not have to) cover the cost of explaining English mortgage law in its present state. Thirdly, there is the increased pressure for simpler, quicker, and cheaper conveyancing. The lack of standardisation of mortgage forms can be seen as an obstacle to simplification, and

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7 Samuel v. Jarrah Timber and Wood Paving Corporation [1904] A.C. 323 at p. 326.

8 In 1985 a building society mortgage deed won one of eight Golden Bull booby prizes awarded in the Plain English Awards Competition jointly run by the National Consumer Council and Plain English Campaign. The comment of the judges of the competition was: "Mind-boggling - how is any average house-buyer supposed to understand this stuff?"

it is generally acknowledged that there is little prospect of achieving a useful level of standardisation without substantive reform of the law. We consider the question of standardisation in paragraphs 5.29-5.44 below.

1.3 A more recent development lending urgency to the need for reform is a dramatic increase in the number of mortgage defaults. In 1985 64,301 mortgage actions were commenced in the County Court in England and Wales, which represents about 0.80% of all mortgages over owner-occupied dwellings subsisting in that year. This is more than double the figure for 1980:

	1980	1981	1982	1983	1984	1985[9]
Mortgage actions entered in the County Court	27,105	38,284	41,799	43,274	54,754	64,301

9 Source: Judicial Statistics and Lord Chancellor's Department. In a press release dated 11 August 1986 the Building Societies Association announced that in 1985 building societies took into possession 16,770 properties; of the 9390 taken into possession in the second half of 1985 42% were surrendered voluntarily. The high proportion of voluntary surrenders tends to indicate that the default problem is yet more serious than that revealed by the Judicial Statistics.

The reasons for this increase,[10] and the extent to which it affects different types of borrower,[11] are beyond the scope of this Working Paper. The important point for our purposes is that such a high level of enforcement puts the mortgage system under great strain. Because it is increasingly likely that a

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10 For a detailed analysis of the problem see in particular National Consumer Council, Behind with the Mortgage - Lenders, Borrowers and Home Loan Debt: A Consumer View (1985); Building Societies Association, Mortgage Repayment Difficulties (1985); J. Doling, V. Karn and B. Stafford, A Study of Mortgage Possession Actions in Coventry County Court (1984) University of Birmingham C.U.R.S. Working Paper No. 96.

11 It is not clear whether the increase is confined to mortgages of dwellings. It is possible for a mortgagee to exercise its power of sale without bringing any court action, and we believe that such extra-judicial enforcement is the most popular method of enforcing non-residential mortgages (but see note 9 above). However, no figures are available either to substantiate this, or to show whether or not such enforcements have increased. High Court mortgage actions have not increased in the same way as County Court ones, but it is difficult to assess the significance of this:

Mortgage actions commenced in the Chancery Division	1980	1981	1982	1983	1984	1985
	779	526	738	861	822	965

(Source: Judicial Statistics)

mortgagee will have to enforce the security, it is important to ensure that our enforcement system works effectively. It should provide adequate safeguards for mortgagors, and at the same time operate with sufficient efficiency and certainty not to deter mortgagees from lending on the security of interests in land. We set out in paragraphs 3.46-3.73 the ways in which we suggest the present law falls short of these requirements.

1.4 Another reason why a review of the law of land mortgages is now opportune is that the law relating to security over property other than land is currently also under review. In 1985 Professor Aubrey Diamond was asked by the Minister of Corporate and Consumer Affairs to examine the need for alteration of the law in this area, and as a part of that exercise a Consultation Document has just been published.[12] Although on the whole the system for mortgaging interests in land is distinct from the systems in operation in relation to other property, there are some important points of contact and overlap. In these areas it is clearly important that the rules applicable to each system should not produce conflicting or inconvenient results. Simultaneous reviews of land mortgages and of security over other property present an opportunity to deal with these points that it would be a pity to miss.

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12 Security over Property other than Land: A Consultation Document by A. L. Diamond (1986)

1.5 Finally, there is an impetus to reform provided by the successful introduction of a new land mortgage system in Scotland. The Conveyancing and Feudal Reform (Scotland) Act 1970 brought about major changes in land mortgage law and practice in Scotland and provides many valuable insights into possible reforms here.

PART 2: THE PRESENT SYSTEM AND HOW IT EVOLVED

A. How the present system evolved

2.1 Before examining in detail the problems of the existing system it is necessary to explain in broad terms how the existing system evolved,[1] since so much of the complexity in our present law is attributable to its historical development rather than to any inherent difficulty in the issues involved.

2.2 The modern English land mortgage is basically an adaptation of a property transfer type mortgage which has been in common use in this country since at least the sixteenth century. Until the 1920s' property legislation there was no restriction on the form which a mortgage could take, but the most usual form was an outright transfer of the property from the mortgagor to the mortgagee with a proviso that the mortgagee would transfer the property back on repayment of the loan on the due date. At common law this transaction was accepted at face value, i.e. during the subsistence of the mortgage the mortgagor was treated as having no proprietary interest in the property, merely a personal right to have the property returned on repayment on the due date. If payment was not made on that date, the mortgagor's right to have the property returned was extinguished. Strict enforcement of the mortgagee's legal right was progressively eroded by the courts of equity, in particular in the following ways:-

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1 For a detailed account of the historical development of mortgages see the leading textbooks and in particular H.G. Hanbury and C.H.M. Waldock, The Law of Mortgages (1938).

(a) the equitable right to redeem The mortgagor was given an equitable right to have the property returned on payment of all sums due even though the legal date for repayment had passed. This equitable right was exercisable until extinguished by sale or foreclosure.[2] So, from the date of creation of the mortgage, the mortgagor had a legal right to redeem and an equitable right to redeem, the latter surviving the extinguishment of the former. Notwithstanding changes made to mortgage law by the Law of Property Act 1925, this remains the case today.

(b) the equity of redemption Despite the transfer of the legal estate, equity regarded the mortgagor as retaining a significant proprietary interest in the land. This was the equity of redemption. It was a novel right created by and recognised only in equity, and it was fully proprietary in the sense that it was transferable, inheritable and effective against third parties. It is easier to describe its effect than to define its content, but broadly its recognition resulted in a situation whereby the mortgagee had the full legal title but the mortgagor had a powerful equitable proprietary interest the existence of which restricted the

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2 It could (and can still) even be revived after foreclosure absolute in appropriate cases: see para. 3.55 below.

exercise of ownership-type rights by the mortgagee. It is still technically accurate to describe a mortgagor's interest as including an equity of redemption, in addition to the legal estate now retained by the mortgagor.[3]

(c) the equitable protective jurisdiction Equity exercised a supervisory jurisdiction over the terms of the mortgage and over the exercise of the mortgagee's rights and remedies. For present purposes it is useful to distinguish two reasons for the emergence of this protective jurisdiction. The first was the need to counter-balance the inappropriately strong position the mortgagee was put in at common law. This explains, for example, the detailed and never wholly satisfactory rules requiring a mortgagee in possession to account strictly on the basis of wilful default, which only became necessary because the transfer of title gave the mortgagee an inherent right to possession, rather than a remedy exercisable on default. This problem survives in the present law, and we consider it in more detail in paragraphs 3.23-3.25 and 3.47. The second reason was that the Courts considered that mortgagors as a class needed protection, partly because they were debtors

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3 See further Fisher and Lightwood p. 520 and the works referred to there.

and "necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose on them",[4] but largely because they were regarded as landowners whose weaknesses or misfortunes were being exploited by moneylenders. This judicial attitude explains rules such as the prohibition of mortgage terms entitling the mortgagee to purchase the mortgaged property, or unduly postponing the mortgagor's right to redeem. Again, these rules survive in our present law, and we consider in paragraphs 3.31-3.36 whether the social and economic changes which have altered the emphasis in the justification for protecting mortgagors also make it desirable to change the ambit and content of the protection.

2.3 Significant changes were made to this mortgage structure by the 1920s' property legislation but overall they did not result in the law becoming simpler. Radical simplification was proposed by Lord Haldane but his proposals were rejected.[5] Instead, the Law of Property Act 1925 re-introduced as a prescribed method of mortgaging land the highly artifical mortgage by demise, whereby the mortgagee is granted a lease subject to a proviso that the lease term will end on

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4 Lord Henley in Vernon v. Bethell (1761) 2 Eden 110 p.113.

5 Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales. (1919) Cmd. 424.

repayment.[6] This type of mortgage was familiar to Glanvil and Bracton in the twelfth and thirteenth centuries and over the next few centuries it was revived periodically as an alternative to the property transfer mortgage, but it appeared to have finally become obsolete by the middle of the nineteenth century.[7] The decision to reintroduce it was taken because it

> "enabled the Bill to be drafted in terms which are familiar to all lawyers and ... avoided the necessity of introducing a new phraseology such as was inevitable in Lord Haldane's Real Property and Conveyancing Bill."[8]

As a device for slotting mortgage law neatly into the reformed land tenure structure created by the 1925 legislation the mortgage by demise was ingenious and successful. It left both mortgagor and mortgagee with a legal estate of known attributes without requiring any alteration to or inconsistency in the simplified structure of legal and equitable estates and interests set out in the Law of Property Act 1925 section 1. However, it complicated mortgage law by replacing one inappropriate legal structure with a different but equally inappropriate one.[9] The Law of Property Act 1925 also created a new type of mortgage, the charge by way of legal mortgage, which is prescribed as the only other method of creating a legal mortgage, but is then defined solely in terms of the mortgage by demise.[10]

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6 The mortgage by demise was in fact introduced by the Law of Property Act 1922 s. 9 and Schedule. 2.

7 Megarry and Wade p. 915 and the works referred to there.

8 Cmd. 424 para. 24(d).

9 See para. 3.4 below.

10 Law of Property Act, 1925 ss. 85-87.

As anticipated, the charge by way of legal mortgage has in practice almost entirely superseded the mortgage by demise. So what we now have as a principal form of mortgage is something that appears on its face to create a sui generis security interest but in fact creates a quasi-leasehold relationship, which is extensively adapted by equitable principles originally evolved to temper a different legal relationship.

2.4 Since 1925 equity has had difficulty in continuing the process of moulding this cumbersome system to fit changing circumstances[11] and some piecemeal statutory reform has been necessary. In particular, mortgagor protection has been extended by the Administration of Justice Act 1970 Part IV[12] and the Consumer Credit Act 1974, which we consider in paragraphs 3.68-3.69. On the whole, the twentieth century statutory reforms have improved the way the law operates in practice at the price of adding further layers of complication.

B. The existing system

2.5 English law in its present state recognises a number of different security interests in land: legal mortgages, equitable mortgages (which can be of a legal

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11 For attempts which have enjoyed varying degrees of success see e.g. the Chancery Masters' exercise of discretion under the 1936 Practice Direction to the old R.S.C., 0.55, r. 5A and Birmingham Citizens Permanent Building Society v. Caunt [1962] Ch. 883, and Quennell v. Maltby [1977] 1 WLR 318.

12 As amended.

estate or of an equitable interest), equitable charges (consensual or arising by operation of law), and liens. In addition, interests in land may be affected by floating charges. In this Working Paper we do not deal with non-consensual security interests (i.e. non-consensual equitable charges and liens) nor with floating charges.[13] We believe that their operation will not be affected by our proposals but we welcome comments from anyone who anticipates difficulties that we may have overlooked. In the following paragraphs we give a brief description of the remaining interests.

2.6 Legal mortgage A legal mortgage can be granted over a legal estate (or interest) only. As explained in paragraph 2.3, there are only two ways of creating a legal mortgage: by executing a demise[14] for a term of years absolute ("the mortgage by demise") or by executing a charge which is expressed to be by way of legal mortgage ("the charge by way of legal mortgage")[15]. A legal mortgage must be made by deed[16], and as an additional requirement in registered land neither a mortgage by demise nor a charge by way of

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13 Floating charges are created by companies over all types of property, not only (or even primarily) land; these are discussed in Professor Diamond's review, see para. 1.4 above.

14 Or, if the mortgaged property is a lease, a sub-demise for a term which is at least one day shorter than the unexpired residue of the lease.

15 Law of Property Act 1925 ss. 85(1) and 86(1).

16 By Law of Property Act 1925 s. 205(1)(ii) it comes within the definition of a conveyance of an interest in land and so falls within s. 52(1) of the 1925 Act.

legal mortgage can take effect as a legal mortgage unless it is substantively registered.[17] In effect, for reasons already explained, a charge by way of legal mortgage is precisely the same as a mortgage by demise.[18]

2.7 Equitable mortgage of a legal estate An equitable mortgage is created over a legal estate whenever there is an enforceable agreement to create a mortgage, but insufficient formalities to create a legal mortgage. In particular, the circumstances in which it arises can be put into three main categories:

(a) A formal agreement to create a legal mortgage This agreement itself creates an equitable mortgage provided it is specifically enforceable. In this context, the agreement is specifically enforceable if it is evidenced in writing or supported by a sufficient act of part performance[19], and if the loan which the mortgage is intended to

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17 Land Registration Act 1925 s. 106(2) as substituted by the Administration of Justice Act 1977 s. 26(1).

18 Law of Property Act 1925 s. 87(1). Any doubt there may have been on this point has been removed by the court: see Fisher and Lightwood p. 25 and cases cited there at notes (h) and (i).

19 I.e. it is a contract for the disposition of an interest in land for the purpose of Law of Property Act 1925 s. 40.

secure has been made.[20] Subject to these requirements the agreement need not be in any particular form.

(b) An informal mortgage An equitable mortgage arises where the parties evince an intention to create a mortgage but (deliberately or accidentally) fail to complete all the formalities necessary to create a legal mortgage. This is treated in equity as an agreement to create a legal mortgage,and so constitutes an equitable mortgage provided it is specifically enforceable in the way described in (a) above. Such deliberately informal mortgages were once commonly used to save stamp duty and land registration fees. However, mortgage stamp duty was abolished in 1971[21] and exemption from land registration fees for the registration of mortgages was extended in 1973[22], so thereafter the main

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20 If the mortgage secures an antecedent debt, or some other obligation or liability, there must be some other consideration such as a forbearance from suing.

21 Finance Act 1971 s. 64.

22 In 1973 the fee for registering a mortgage where the application accompanies an application for registration of a transfer for value was reduced from half the ad valorem based fee to nil. (Land Registration Fee Order 1973 S.I. 1973 No. 1009 para. 2, now contained in the Land Registration Fee Order 1985 S.I. 1985 No. 359 para. 6(1) and Sch. 6 Pt. I Abatement 2). There has always been an exception from payment of fees where the application for registration of the mortgage accompanies an application for first registration of title (see now Abatement 1 of the 1985 Fee Order).

reason for deliberately choosing an equitable rather than a legal mortgage is presumably to avoid the formality of a deed. In practice, a deliberately informal mortgage usually takes the form of a mortgage by deposit.

(c) Mortgage by deposit of title deeds The mortgagor creates an equitable mortgage by depositing the title deeds or land certificate with the mortgagee, with the intention of creating a security. This can be regarded as simply an example of the deliberately informal mortgage described in (b) above, except that the requirements for specific enforceability are relaxed to the extent that the deposit of title deeds is treated as a sufficient act of part performance.[23] This means that no other act or writing is required, but in practice the mortgagor often does sign or execute a written memorandum to give the mortgagee greater powers than an equitable mortgagee would otherwise have.

2.8 Equitable mortgage of an equitable interest A mortgage of an equitable interest is necessarily equitable. It can arise accidentally or be created deliberately:

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23 This is a departure from the general principle that the person seeking to enforce an agreement must rely on his own part performance, not that of the other party. For further discussion see Megarry and Wade pp. 928 and 590-1.

(a) Accidental creation The most important example of this is where a mortgagor purports to create a legal mortgage, but does not have, or has no power to charge, a legal estate. In those circumstances as a general rule, the purported legal mortgage takes effect as an equitable mortgage of any equitable interest the mortgagor has in the land in question. It most often occurs when one of two joint holders of a legal estate purports to create a legal mortgage by pretending to be solely entitled or by forging or obtaining by improper means the co-owner's signature.[24]

(b) Deliberate creation If created deliberately, an equitable mortgage of an equitable interest takes the same form (and is governed by the same principles) as a mortgage of chattels or choses in action, i.e. it consists of an assignment of the mortgaged interest to the mortgagee with a proviso for re-assignment on repayment. Where the mortgaged interest is an interest in land, the assignment must be in writing and signed by the mortgagor or the mortgagor's agent.[25]

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24 This point is not free from doubt: H. G. Hanbury and R. H. Maudsley, Modern Equity (1985) 12th ed. pp 295-6

25 Law of Property Act 1925 s. 53 (1)(c): there is some doubt whether this applies to mortgages of equitable interests which have come into existence through an implied or resulting trust. See s. 53(2).

2.9 Equitable charge Equitable charges can be created consensually over any legal or equitable interest in land (and indeed in any other property). No formalities are necessary for their creation: the sole requirement is that the parties demonstrate an intention to make the property "liable, or specially appropriated, to the discharge of a debt or some other obligation".[26]

2.10 The precise relationship between mortgagor and mortgagee, the means of enforcement available, and the systems for protection and priority, vary according to which type of security is created. We consider these points in paragraphs 3.1-3.29. The nature and extent of the protection given to mortgagors does not depend on the type of security created, but on various other factors, which we discuss in paragraphs 3.30-3.73.

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26 Fisher and Lightwood p. 14. See also Swiss Bank Corporation v. Lloyds Bank Ltd. [1980] 2 All E.R. 419 at p. 425 per Buckley L.J. in the Court of Appeal and [1981] 2 All E.R. at p. 453 per Lord Wilberforce in the House of Lords.

PART 3: OUTLINE OF THE PROBLEMS

3.1 It will be apparent from the preceding paragraphs that we consider that the major defect in the present law is its unnecessary complexity, and that this is attributable mainly to problems in the structure of mortgage law. In the succeeding paragraphs we explain these structural problems. We also explain other, more particular, problems in the law that have become apparent from the cases and legal commentary in this area.

A. Structural problems

3.2 Multiplicity of types of mortgage It is generally agreed that we have too many types of mortgage, and too many methods of creating some of the types.[1] The following table (overleaf) summarises the structure described in paragraphs 2.5-2.9 above. The variety is even greater than appears at first sight, because whilst an equitable charge over a legal estate is the same as an equitable charge of an equitable interest, an equitable mortgage of a legal estate is quite different from an equitable mortgage of an

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1 For criticisms see in particular G.A. Grove, "Conveyancing and the Property Acts of 1925" (1961) 24 M.L.R. 123 at p. 131; P. Jackson, "The Need to Reform the English Law of Mortgages" (1978) 94 L.Q.R. 571 at p. 574.

Type of Interest	Type of mortgage	Method of creation
Legal Estate	Legal mortgage	mortgage by demise
		charge by way of legal mortgage
	Equitable mortgage	contract to create legal mortgage
		Informal mortgage
		deposit of title deeds
	Equitable charge	evidenced intention
Equitable Interest	Equitable mortgage	assignment of equitable interest
	Equitable charge	evidenced intention

equitable interest.[2] As we explained in paragraphs 2.1.-2.4., this number and variety is historically explicable, but it is doubtful whether it now serves any useful purpose. In particular, there is considerable criticism of the continued existence of the mortgage by demise now that it is clear that a charge by way of legal mortgage has the same effect.[3] The problem with the equitable mortgage of a legal estate is rather different. Apart from the mortgage by deposit[4], the routes towards creating the equitable mortgage result from the rule in Walsh v. Lonsdale[5], a general property law principle which applies to mortgages in precisely the same way as it applies to fees simple, leases and easements.[6] Nevertheless, if

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2 In an equitable mortgage of a legal estate, the mortgagee is treated in equity as if he had a legal mortgage (i.e. as if he had the quasi-leasehold interest he would have had if he had taken a mortgage by demise or a charge by way of legal mortgage). In an equitable mortgage of an equitable interest, the mortgagee holds the mortgaged equitable interest, subject to the mortgagor's equity of redemption.

3 We believe that the Chief Land Registrar and the Building Societies Association advocate abolition of the mortgage by demise. See also the articles referred to in note 1 above.

4 Which is anyway a minor variation from the "informal" mortgage: see para. 2.7 above.

5 (1882) 21 Ch. D. 9.

6 I.e. a specifically enforceable contract, or failure to use sufficient formalities, to transfer a fee simple or grant or transfer a lease or easement, gives rise to the equivalent equitable interest.

one adds in the equitable charge, it does mean that there are four ways of creating an informal mortgage of a legal estate. We are not aware of any difference in function between the four: none seems to fulfill a function that could not be fulfilled by any of the others. We consider in paragraphs 3.72 and 3.73 the powers and remedies of an informal mortgagee or chargee, but in practical terms the significant factor is not how the security is created, but whether it is made or accompanied by a deed. Finally, it is questionable whether it is necessary for the method of creating a formal mortgage of an equitable interest to be different from the method for creating a formal mortgage of a legal interest. There is no reason in principle why the same type of security should not be used for both legal and equitable interests, although clearly this is not feasible for so long as the mortgage by demise is retained.

3.3. Inappropriateness of form A major source of confusion and complexity is that the methods used to create legal and equitable mortgages give rise to inappropriate relationships between the parties, which must then be extensively adjusted by equity, statute and express terms.

3.4 The mortgage by demise The problem here is of central importance, because it affects not only the mortgage by demise but also the charge by way of legal mortgage, which is treated by statute as if it were a

mortgage by demise[7], and the equitable mortgage of a legal estate, which is treated in equity as if it were a legal mortgage.[8] The problem is that it creates a relationship of landlord and tenant between the parties. There is nothing unusual about using the leasehold relationship as an investment device: institutional lenders are much more likely to take a leasehold interest than a mortgage to finance property development or invest in non-residential property.[9] However, in the case of the mortgage by demise, the leasehold relationship is the wrong way round: as tenant, the mortgagee has inherent rights to possession and to grant subsidiary interests[10] which would more appropriately lie with the mortgagor (subject to

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7 Law of Property Act 1925 s. 87.

8 See note 2 to para. 3.2. above. For a fuller discussion see H.W.R. Wade, "An Equitable Mortgagee's Right to Possession" (1955) 71 L.Q.R. 204.

9 The overwhelming preference for lease-based rather than mortgage-based arrangements seems to result largely from financial and fiscal considerations, but it may well be influenced to some extent by uncertainty and inflexibility in mortgage law. There is some evidence that there is scope for mortgages to be more widely used: A.P.J. McIntosh, "Funding hi-tech industrial property" (1984) 269 E.G. 710. See also N. Bowie, "Investing in retailing" (1984) 271 E.G. 1064 where the complaint is made that the traditional long-lease method of financial retail developments "so often restricts, slows down or prevents essential updating of centres and buildings."

10 The mortgagee's inherent right to sub-let is modified by statute: Law of Property Act 1925 s. 99. See para. 3.26 below.

whatever restrictions may be necessary to protect and enforce the security). Similarly, the mortgage deed is likely to impose on the mortgagor duties to preserve the security by, for example, repair and insurance, that it would be more usual to impose on a tenant than on a landlord. (There are other problems about possession, repair and insurance, and we deal with them separately in paragraphs 3.23-3.29.) Even if reversed, the landlord and tenant relationship is fundamentally different from that created by a mortgage: lesssor-investors buy outright a share in the property which necessarily has a fluctuating capital value, whereas mortgagee-investors have an interest in the property only for the temporary purpose of safeguarding the repayment of a fixed capital loan. It seems an unnecessary impoverishment of the system to blur such a useful distinction by defining one device in terms of the other.

3.5 The equitable mortgage of an equitable interest The mortgage by assignment is the mortgage in its purest (or, depending on one's point of view, most primitive) form.[11] The obvious theoretical objection to it is that it gives the mortgagee too great an interest in the mortgaged property at the outset, so the balance has to be redressed by a structure of rules curbing the mortgagee's exercise of

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11 Sykes on Securities p. 14 describes it as "the most primitive and, having regard to the purposes of a security, the most inelegant form of security."

ownership-type rights. A practical objection to it in this context is that it continues to apply to equitable interests in land long after it has ceased to apply to legal estates. Since the mortgage by assignment is still the principal method of mortgaging chattels and choses in action, this means that mortgages of equitable interests in land are governed by principles whose development is dominated by considerations applicable to personal rather than real property. In considering whether this is a good or a bad thing, it is important to bear in mind that two distinct classes of equitable interest in land can be mortgaged.[12] The first class consists of interests under a trust of land: in this paper we refer to these interests as "trust equitable interests". The most common type of trust equitable interest, the beneficial interest in possession of a co-owner under a trust for sale, is unlikely to be mortgaged separately from the legal estate[13], because it is difficult to realise the security.[14] The trust equitable interest most likely to be mortgaged is a reversionary or remainder interest under a rather more sophisticated settlement of land, and it is arguable that such interests are primarily

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12 These classes are treated differently for priority purposes: see paras. 3.18-3.20 below.

13 Except accidentally, in the circumstances described in para. 2.8. above.

14 The equitable interest on its own usually has no market value, and to procure a sale of the legal estate the mortgagee would have to apply to the court to exercise its discretion to order a sale under the Law of Property act 1925 s. 30, unless the other co-owner co-operated.

financial or investment interests and so perhaps should be subject to the same mortgage rules as choses in action. The second class of equitable interest (which in this paper we refer to as "commercial equitable interests") consists of those that arise out of contractual rights to acquire a legal estate e.g. agreements for leases and other estate contracts, options to purchase and rights of pre-emption.[15] Such interests are frequently mortgaged, either independently or as a result of a mortgage of rights under a building or development agreement.[16] We welcome comments from anyone concerned in the mortgage of either class of equitable interest; in particular we are interested to know whether they see advantages in continuing to treat such mortgages as if they were of personal property, rather than adopting what prima facie appears the neater and simpler solution of assimilating them into the law applicable to legal mortgages of land.

3.6 Confusion about form There is a clear theoretical distinction between mortgages and charges: a mortgage involves some degree of transfer of the mortgaged property to the mortgagee with a provision for re-transfer on repayment of the loan, whereas a charge merely gives the chargee a right of recourse to

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15 To the extent that rights of pre-emption survive as proprietary interests following Pritchard v. Briggs. [1980] Ch. 339.

16 See for example Property Discount Corporation Ltd. v. Lyon Group Ltd. [1981] 1 W.L.R. 300.

the charged property as security for the loan.[17] However, in English law the distinction is blurred and the terms are often used interchangeably, sometimes as if they were synonymous and sometimes as if one was a generic term including the other.[18] As far as we know, this confusion causes no problems and has no actual or potential practical significance, with the possible exception of the points raised in the next two paragraphs.

3.7 The nature of a legal mortgage The correct characterisation of the mortgage by demise and the charge by way of legal mortgage is uncertain. The mortgage by demise is prima facie a mortgage, but the equitable restriction of the mortgagee's ownership-type rights has resulted in it acquiring a close resemblance to a charge. The charge by way of legal mortgage is in form a charge, but in substance it is the same as the mortgage by demise.[19] We cannot see that any of this matters, nor do we think it necessary to consider how to characterise any new statutory form of security that

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17 Sykes on Securities Chapters 1 and 24; Megarry & Wade p. 914; Fisher and Lightwood pp. 4-5. For judicial analyses of the distinction see London County and Westminster Bank Ltd. v. Tompkins [1918] 1 KB 515 (C.A.) and Swiss Bank Corporation v. Lloyds Bank Ltd. [1980] 2 All. ER. 419 (C.A.) at p. 425-6.

18 See the examples given in Fisher & Lightwood at pp. 4-5.

19 Megarry & Wade p. 926 and Sykes on Security Ch. 1.

would be created if the proposals we make in Part 5 are adopted. We can see no difficulties in leaving such a security sui generis, provided it is made clear what its attributes are and what rights and obligations the parties have. However, we welcome comments on this point.

3.8 The distinction between equitable mortgages and equitable charges The remedies of an equitable chargee are different from those of an equitable mortgagee of a legal estate. An equitable mortgagee is entitled to call for a legal mortgage, to foreclose, and possibly to take possession, whereas an equitable chargee has none of these rights. For this reason it is important to distinguish the two, yet frequently the distinction is not observed, even by the courts.[20] We know of no case where such an incorrect categorisation has affected the decision, but it does seem unnecessarily confusing. Probably the only way out of the confusion now is to assimilate the two completely, either formally or by giving both the same rights and remedies.

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20 For recent examples see Thames Guaranty Ltd. v. Campbell [1984] 3 WLR 109 at pp. 117 and 119-120 per Mann J (at first instance) and at pp. 128-129 per Slade LJ (in the Court of Appeal); First National Securities Ltd. v. Hegerty [1984] 3 WLR 769 at p. 779 per Sir Denys Buckley (in the Court of Appeal); Cedar Holdings Ltd. v. Green [1981] Ch. 129 at pp. 142-3 per Buckley LJ; In re Wallace & Simmonds (Builders) ltd. [1974] 1 WLR 391.

B. Protection, priority and tacking

3.9 Protection and priority in registered land

We explained the problems in the law relating to protection and priority of mortgages of registered land in our Working Paper No. 67 published on 15 April 1976, and we have recently made recommendations for changes in the land registration system to deal with these problems.[21] Some of the comments we make in the following paragraph in relation to mortgages of unregistered land are relevant in registered land to mortgages which are not protected on the register, since the priority between such mortgages is governed by the principles we discuss in paragraphs 3.14-3.16.[22] Also, there are two areas which can conveniently be dealt with under the heading of protection and priority and which cause similar problems in registered and unregistered land: these are equitable mortgages of equitable interests and tacking of further advances. We deal with these in paragraphs 3.18-3.20 and 3.21 respectively.

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21 Third Report on Land Registration: Protection and priority of minor interests (and of mortgages and charges) (forthcoming). One of the suggestions made in Working Paper No. 67, that the obsolete mortgage caution should be abolished, was implemented by the Administration of Justice Act 1977 s. 26(1).

22 Under existing law, the same is true of mortgages protected by notice or caution: see our forthcoming Third Report on Land Registration.

3.10 Protection and priority in unregistered land

In unregistered land the basic principles are simple and straightforward. Mortgagees who have not taken a deposit of the mortgagor's title deeds must register their mortgages as Class C land charges in the Land Charges Register in accordance with the provisions of the Land Charges Act 1972[23] in order to make the mortgage binding on third parties. If not registered, the mortgage is void as against a purchaser of any interest in the land (or, if registrable as a Class C(iv) land charge, a purchaser for money or money's worth of a legal estate). Priority between mortgages registrable as land charges is according to date of registration.[24] Mortgages which are accompanied by a deposit of title deeds are not registrable, and in theory their protection and priority depend on the pre-1926 rules we explain in paragraphs 3.13-3.16. In practice, of course, it is the fact of the mortgagee holding the title deeds that provides the major element in the protection of the security, since it makes it almost impossible for the mortgagor to deal effectively with the property without the mortgagee's co-operation.

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23 The Land Charges Act 1972 consolidated the Land Charges Act 1925 and its subsequent statutory amendments. The problems described in this para. arise out of provisions which were substantially the same in the 1925 Act.

24 Law of Property Act 1925 s. 97.

Although this system is fundamentally simple and workable[25], it gives rise to a number of problems. These are set out in the following paragraphs.

3.11 The correct registration of equitable mortgages of a legal estate The usual practice is to register all equitable mortgages of a legal estate as Class C(iii) land charges if not protected by deposit of title deeds and to make no registration of those which are protected by deposit of title deeds. Whilst this probably conforms to the intention of the creators of the land charges system, there is some argument as to whether it is entirely justified by the wording of section 2 of the Land Charges Act 1972. Section 2, so far as relevant here, reads as follows:-

> **2. The register of land charges**
>
> (1) If a charge on or obligation affecting land falls into one of the classes described in this section, it may be registered in the register of land charges as a land charge of that class.
>
> ...
>
> (4) A Class C land charge is any of the following (not being a local land charge) namely -
>
> (i) a puisne mortgage;

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25 The Land Charges system in general is not usually described so favourably. In the Report of the Committee on Land Charges (1956) Cmd. 9825 ("the Roxburgh Committee") para 7. the system was described as "fundamentally unsound" and we expressed similar views in our Transfer of Land: Report on Land Charges Affecting Unregistered Land (1969) Law Com. No. 18.

(ii) a limited owner's charge;

(iii) a general equitable charge;

(iv) an estate contract;

and for this purpose -

...

(iii) a general equitable charge is any equitable charge which -

(a) is not secured by a deposit of documents relating to the legal estate affected; and

(b) does not arise or affect an interest arising under a trust for sale or a settlement; and

(c) is not a charge given by way of indemnity against rents equitably apportioned or charged exclusively on land in exoneration of other land and against the breach or non-observance of covenants or conditions; and

(d) is not included in any class of land charge;

(iv) an estate contract is a contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right.

The problem here lies in the juristic nature of the equitable mortgage of a legal estate. If it is enforceable only because it is treated in equity as a contract to create a legal mortgage, then it is arguable that it ought to be registered as a Class C(iv) estate contract. In the case of mortgages not protected by deposit of title deeds, this would seem to

follow from paragraph (iii)(d) of subsection (4). It matters whether such mortgages are properly registrable as C(iii) or as C(iv) land charges because the consequences of non-registration are different: a land charge of Class C(iii) comes within section 4(5), and so if not registered is void against a purchaser of any interest in the relevant land, whereas a land charge of Class C(iv) comes within section 4(6) and if not registered is void only against a purchaser for money or money's worth of a legal estate in the land. The problem extends to equitable mortgages which are protected by deposit of title deeds. The Land Charges Act 1972 does not say that they are not registrable at all, it only says that they are not registrable under Class C(iii)[26], so it is arguable that they too are registrable under Class C(iv), and hence void against a purchaser of the legal estate if not so registered. The Roxburgh Committee[27] suggested in 1956 that "any convenient opportunity might be taken to make it clear" that such mortgages are not registrable. We think that, even if the existing system of registration of mortgages in unregistered land is to continue substantially unaltered, it would be sensible to clarify these two points now.

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26 Land Charges Act 1972 s. 2(4)(iii)(a).

27 Report of the Committee on Land Charges (1956) Cmd. 9825, at para. 16.

3.12 Conflict between the Land Charges Act 1972 s.4(5) and the Law of Property Act 1925 section97[28]

The Law of Property Act 1925 section 97 provides that legal and equitable mortgages not protected by deposit of title deeds rank for priority purposes according to their date of registration as land charges. Where there are successive registrable mortgages, and a later one is created before an earlier one is registered, the application of section 97 can give an order of priority different from that produced by the application of the Land Charges Act 1972 section 4(5). The example usually given is:

Jan. 1st mortgage A created
Jan. 2nd mortgage B created
Jan. 3rd mortgage A registered
Jan. 4th mortgage B registered

According to section 97 A takes priority over B because that is their order of registration. However, according to section 4(5), B takes priority over A because mortgage A was not registered "before the completion of the purchase" (i.e. creation of mortgage B) and hence is void against mortgage B. No such problem has ever come before the courts, and it is uncertain how the court would resolve the conflict if required to decide which of the two sections prevails: cogent arguments can be put forward in favour of either

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28 For a full discussion of the points in this para. see Megarry & Wade pp. 996-1003, from which we have taken the examples given here.

solution.[29] The problem does not lie simply in the conflict between the two sections: the application of section 4(5) can lead to insoluble priority circles where there are three or more registrable mortgages even without the complicating factor of section 97. For example:

Jan. 1st mortgage A created
Jan. 2nd mortgage B created
Jan. 3rd mortgage A registered
Jan. 4th mortgage C created

The result of section 4(5) is that B takes priority over A, which takes priority over C, which takes priority over B. Again, no such situation has ever reached the courts, but if it does there is no obvious way of resolving the problem.[30] Any reform of the priority system in unregistered land would provide an opportunity for eliminating these conundrums.

3.13 Deposit of title deeds The distinction between those mortgages that are protected by deposit of title deeds and those that are not is central to the

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29 See, for example, Megarry and Wade pp. 996 et seq.; Cheshire and Burn's Modern Law of Real Property (1983) 13th ed p. 675; W.A. Lee, "An insoluble problem of mortgagees' priorities" (1968) 32 Conv (N.S.) 325; A.D. Hargreaves, (1950) 13 MLR 533 at p. 534.

30 See Megarry & Wade pp. 1001-2 for suggested solutions and their drawbacks.

land charges system. However, because of the nature of title deeds, two problems not envisaged by the system can occur:

(a) split title deeds It is not clear whether a mortagagee must hold all the title deeds in order to be exempted from registration. Probably, by analogy with the cases which establish that an equitable mortgage can be created by the deposit of less than all the title deeds[31], a mortgage will be treated as "protected" or "secured"[32] by deposit of title deeds for the purposes of the Land Charges Act if those that the mortgagor deposits provide "material evidence of title."[33] If this is correct, it means that in theory it is possible for there to be more than one mortgage protected by deposit of title deeds simultaneously, although it must be a very rare occurrence. This situation is not covered by the Land Charges Act, and so the priority between such mortgages would have to be settled by applying the pre-1926 rules described in paragraphs 3.14-3.16 below.

(b) mortgagee loses or relinquishes the title deeds It is usually assumed that the exemption from registration applies where the mortgage is

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31 Megarry & Wade p. 928 and the cases cited there.

32 These terms appear to be used interchangeably in the Land Charges Act s. 2.

33 Lacon v. Allen (1856) 3 Drew. 579.

"originally protected or secured, rather than continuously protected or secured"[34] by deposit of title deeds. In other words, the mortgage does not become registrable if the mortgagee subsequently ceases to hold the deeds. It is not clear from the Land Charges Act whether this view is correct. The argument against accepting it is that once the mortgagee has parted with the deeds, there is no way in which any subsequent purchaser or mortgagee can discover the existence of the mortgage. The reason put forward for saying that original protection is sufficent is that "otherwise the mortgage would fluctuate between being registrable and unregistrable as often as the mortgagee parted with the deeds and regained them."[35] We find a certain air of unreality in this argument: since the advent of readily available photocopying facilities we can think of few circumstances in which a prudent mortgagee would knowingly permit the original title deeds to

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34 Megarry & Wade 997.

35 Megarry & Wade p. 997. The point is put with greater force in P.B. Fairest, Mortgages (1980) 2nd ed :

> "Does the mortgage have to live a kind of Cheshire Cat existence entering and leaving the Land Charges Registry as often as the mortgagor 'borrows' his deeds back and returns them? ... [if the mortgage must be registered whenever the mortgagee parts with the title deeds] there is a risk of the Land Register [sic] becoming cluttered with a number of registrations of charges which are destined to be removed again in a relatively short time" (p. 133).

be removed from its custody[36], and none at all in which the original deeds would be returned to or left with the mortgagor.[37] We return to this point later, at the end of this paragraph, when we consider whether the sort of conduct that ought to affect priority between mortgagees is or should be different from that laid down in the pre-1926 cases on the subject. The position is of course different when the mortgagee loses the deeds involuntarily, perhaps through theft by the mortgagor. However, even in these circumstances it seems odd to allow the mortgagee to continue to rely on original possession of the deeds, making no effort to make the existence of his mortgage known by registration, even after he knows the

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36 The mortgagee may have to produce the original deeds for various official purposes e.g. if one of the deeds has to be produced to the Commissioners of Inland Revenue pursuant to the Finance Act 1931 s. 28 and Sch. 2, as amended, or produced or sent to the Controller of Stamps to be stamped or adjudicated for stamp duty, or where all the original deeds have to be sent to H.M. Land Registry in support of an application for first registration of title. However, arguably the deeds would be treated as remaining in the mortgagee's custody in such circumstances. The only other case we can think of in which a mortgagee would properly part with the original title deeds is if he sub-mortgaged, in which case they would be passed to the sub-mortgagee.

37 c.f. Law of Property Act 1925 s. 96(1), which entitles the mortgagor to inspect and make copies etc., but not to borrow, the title deeds.

deeds have disappeared. It is even odder if our existing system[38] positively prevents him from taking the practical precaution of registering in those circumstances.

3.14 Pre-1926 priority rules In mortgages of unregistered land, whenever a situation occurs in which priority is not expressly covered by the Land Charges Act, pre-1926 non-statutory priority rules come into operation. As we explained in paragraph 3.9. the same happens in registered land in situations not covered by the Land Registration Act 1925. There are two unsatisfactory features of this. First, it seems unnecessarily complicated to have two sets of priority rules. Secondly, the pre-1926 rules evolved out of a different structure of legal and equitable interests, and in an earlier age. As a result, it is not always clear precisely how they now operate, and there is some doubt whether the solutions they provide to priority problems are always appropriate to modern conditions. However, it is important to keep the size of the problem in perspective. It is only in the following, comparatively rare, situations, that a problem of priority between successive mortgages[39] has to be solved by applying the pre-1926 rules:-

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38 I.e. assuming that it is correct to say that only mortgages never protected by deposit of title deeds are registrable.

39 Or between mortgages and other encumbrances.

(a) when an earlier mortgage (legal or equitable) is protected by deposit of title deeds (the Land Charges Act 1972 makes no positive provision for their protection or priority, it simply excludes them from registration). This of course is a very frequent occurence, but it rarely leads to priority problems because the retention of the title deeds in practice prevents the creation of later encumbrances without the mortgagee's consent. In fact, the only situations we can think of in which such a priority problem could arise are those we refer to in paragraph 3.13 above, i.e. where the title deeds are split between successive mortgagees, or where the first mortgagee loses or relinquishes the title deeds.

(b) when an equitable mortgage which is registrable as a Class C(iv) land charge but is not registered is followed by another equitable mortgage: this is because by the Land Charges Act 1972 s.4(6) the consequence of failure to register a C(iv) land charge is that it is void only against a purchaser <u>of a legal estate</u>. We explained in paragraph 3.11 above the doubts about which equitable mortgages are registrable as C(iv) land charges, but at the least the category includes simple agreements to create a legal mortgage in the future.

3.15 The priority rules that apply in these two situations are essentially those that applied to legal and equitable interests generally before 1926:

"The basic rule is expressed in the maxim "Where the equities are equal, the first in time

prevails" or "Qui prior est tempore, potior est jure", "equities" here being used in the sense of "justice". In other words, where the justice of the situation does not demand otherwise, the first in time has priority, and has the right to be paid in full from the security before other mortgagees receive a penny.

To this there were two qualifications, in practice as important as the basic rule itself:

(a) Where the equities are equal, the law prevails; and

(b) The rule that priority enjoyed by a first mortgagee in point of time is lost if the prior mortgagee is guilty of fraud or gross negligence or is estopped from relying on the basic rule. In such a case the "equities" are not equal.

If either of these rules applied, a subsequent mortgage could gain priority over a mortgage prior in point of time."[40]

3.16 The only difficulty in applying these rules to the situations in which they are now likely to be relevant is in determining what conduct upsets the prima facie order of priority. This depends on whether the mortgages in question are legal or equitable:

(a) first legal, second equitable or first equitable, second legal

A first legal mortgage protected by deposit of title deeds prima facie takes priority over a second equitable mortgage. Unsurprisingly and

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40 B. Rudden and H. Moseley; An Outline of the Law of Mortgages (Nokes) (1967) p. 81.

uncontroversially, that priority is lost if the first mortgagee is party to a fraud by which the second is deceived into believing that there is no prior subsisting encumbrance.[41] Also, it seems clear that priority will be lost by conduct that we would now treat as giving rise to an estoppel.[42] What conduct short of this forfeits priority is controversial. The main problem is the case of Northern Counties of England Fire Insurance Co. v. Whipp [43] in which it was held in the Court of Appeal that a legal mortgagee would not be postponed to a subsequent equitable mortgagee by any conduct short of fraud (or estoppel) and that "mere carelessness or want of

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41 Peter v. Russel (1716) 1. Eq. Ca. Abr. 321 (The Thatched House case). The rule stated by the Lord Chancellor Lord Cowper in that case is:

> "If a man makes a mortgage, and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induce the second mortgagee to lend his money, this fraud without doubt will in equity postpone his own mortgage; so if such mortgagee stands by, and sees another lending money on the same estate, without giving him notice, of his first mortgage, this is such a misprision as shall forfeit his priority."(p. 322)

42 Even Fry LJ in Northern Counties of England Fire Insurance Co. v. Whipp (1884) 26 Ch. D. 482 describes conduct that would now probably be treated as estoppel: see para. (1)(b) of the extract from his judgment set out in note 44 below.

43 (1884) 26 Ch. D. 482.

prudence" would never be sufficient.[44] However, several years later in Oliver v. Hinton[45] the Court of Appeal held that for a subsequent legal mortgagee to be deprived of his prima facie priority over an earlier equitable mortgage of which he had no notice, it is not necessary to show fraud, "it is sufficient that he has been

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44 (1884) 26 Ch. D. 482 at p. 494. The judgment of the court was given by Fry LJ. He summarises the position as follows:

> "The authorities which we have reviewed appear to us to justify the following conclusions:-
>
> (1) That the court will postpone the prior legal estate to a subsequent equitable estate: (a), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been held to be sufficient evidence, where such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.
>
> But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

45 [1899] 2 Ch. 264.

guilty of such gross negligence as would render it unjust to deprive the prior encumbrancer of his priority."[46] One puzzling feature of this is why the problem of equitable followed by legal should not be solved simply by applying the doctrine of notice.[47] If the doctrine of notice is not relevant it is difficult to justify the difference in the standard of care in relation to title deeds that these two cases set for legal mortgagees, and the Court of Appeal in Northern Counties of England Fire Insurance Co. v. Whipp[48] clearly did not make such a distinction. Moreover, in Walker v. Linom[49] Parker J. held that the holders of a prior legal estate (trustees of a marriage settlement) lost their prima facie priority over a subsequent equitable interest by conduct which amounted to "great negligence" but was perfectly honest.[50] He took the view that the principle laid down in Oliver v. Hinton[51] must be equally applicable to such a situation:

> "In my opinion any conduct on the part of the holder of the legal estate in relation to the deeds which would make it inequitable for him

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46 [1899] 2 Ch. 264 at p. 274 per Lindley MR.

47 I.e. the legal mortgage takes priority only if he is a bona fide purchaser for value without actual or constructive notice of the equitable mortgage. Lindley MR declined to treat it as an aspect or application of the doctrine of notice.

48 (1884) 26 Ch. D. 482.

49 [1907] 2 Ch. 104.

50 [1907] 2 Ch. 104 at p. 105.

51 [1899] 2 Ch. 264.

> to rely on his legal estate against a prior equitable estate of which he had no notice ought also to be sufficient to postpone him to a subsequent equitable estate the creation of which has only been rendered possible by the possession of deeds which but for such conduct would have passed into the possession of the owner of the legal estate. This must, I think have been the opinion of Fry L.J. in Northern Counties of England Fire Insurance Co. v. Whipp."[52]

Most commentators consider that Walker v. Linom[53] is correct, i.e. the same standard applies in both situations, and it is that laid down in Oliver v. Hinton.[54] It must be accepted, however, that this involves departing from both Northern Counties v. Whipp[48] (in so far as it laid down the "wrong" standard") and Oliver v. Hinton[54] (in so far as it drew a distinction between the two situations).

(b) successive legal mortgages

There is no authority on the question of what conduct reverses the prima facie priority of the first mortgagee, which is unsurprising in view of the fact that successive legal mortgages could not subsist before 1926. It could be argued that the position is the same as where the first mortgage is legal and the

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52 [1907] 2 Ch. 105 at p. 114.

53 [1907] 2 Ch. 105.

54 [1899] 2 Ch. 264.

second equitable, since in both cases one is considering the same question, viz. in what circumstances should a prior legal mortgage protected by deposit of title deeds forfeit priority? Alternatively, it could be argued that the situation of successive equitable mortgages provides a better analogy; in both cases the essential question is what conduct justifies removing established rights by departing from the date order rule. It could matter which argument prevails: as we explain in (c) below, the standard of conduct which upsets the prima facie priority where there are successive equitable mortgages may differ from that discussed in (a) above.

(c) successive equitable mortgages

It may be that the first of two successive equitable mortgages loses priority not only by fraud, estoppel or gross negligence, but also by a lesser degree of negligence.[55] There is some direct authority for the view that the rule is the same as that discussed in (a)

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55 See Megarry & Wade p. 992.

above[56], but this has been doubted[57], and there is judicial support for adopting a stricter standard:

> "As between equitable claims the question is whether one party has acted in such a way as to justify him in insisting on his equity as against the other."[58]

3.17 Leaving aside these uncertainties about what standards the pre-1926 priority cases set, how closely do they approximate to modern expectations? We are interested to know what lenders think about this question, and we invite comments from them and from anyone else involved in dealing with or averting

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56 Taylor v. Russell [1891] 1 Ch. 8 per Kay J in the Chancery Division, but see note 57.

57 In Taylor v. Russell in the Court of Appeal and in the House of Lords, the question of the degree of negligence necessary to postpone the prior equitable interests was not argued. However, Lord Macnaghten in the House of Lords said:

> "I am not at present convinced of the correctness of the view expressed by the learned judge who tried the case in the first instance, that negligence necessary to postpone a prior equitable mortgagee in such a case as the present must be so gross as to render him responsible for the fraud committed on the second mortgagee, and that in fact it is immaterial in such cases whether the prior mortgagee has or has not the legal estate." ([1892] AC 244 at p.262). See also Northern Counties v. Whipp op. cit. at p. 487.

58 National Provincial Bank of England v. Jackson (1886) 33 Ch. D. 1 per Cotton LJ in the CA at p. 13.

priority problems. Our present view is that the existing rules treat careless mortgagees too favourably, and that lenders now expect to have to be more punctilious about obtaining and retaining title deeds than they seem to have been before 1926. The whole issue can of course be avoided by making all mortgages registrable, and we set out proposals for this in Part 5. If, however, it is thought desirable that mortgages protected by deposit of title deeds should remain outside the registration system we suggest that the pre-1926 priority rules should be simplified and clarified, and (subject to the views of our consultees) altered so that prima facie priority over an innocent third party would be lost by any relevant carelessness in relation to the title deeds. Our present proposals for achieving this are set out in Part 8.

3.18 Equitable mortgages of an equitable interest

Mortgages of trust equitable interests are governed by priority rules that are different from those that govern mortgages of commercial equitable interests (see paragraph 3.5 above for the distinction between trust and commercial equitable interests). Mortgages of commercial equitable interests are classified as general equitable charges in unregistered land, and so are registrable as Class C(iii) land charges,[59] and in registered land they are protectable as minor interests

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59 Land Charges Act 1972 s. 2(4); Property Discount v. Lyon Group Ltd. [1981] 1 WLR 300.

by notice, caution or restriction.[60] Mortgages of trust equitable interests, on the other hand, are governed by the rule in Dearle v. Hall[61]. At the time of writing, the Minor Interests Index system still applies to mortgages of some trust equitable interests in registered land[62] but when section 5 of the Land Registration Act 1986 comes into force the Minor Interests Index will be abolished and dealings in trust equitable interests in registered land will be governed by the same priority rules as in unregistered land, i.e. by the rule in Dearle v. Hall.[63] Nevertheless, there are still a number of problems with mortgages of equitable interests; we discuss these in the following two paragraphs.

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60 Such a mortgage could also be an overriding interest, in the unlikely event of the mortgagee/chargee being in actual occupation of the relevant land (Land Registration Act 1925 s. 70(1)(g)).

61 (1828) 3 Russ. 1. The rule is amended (and extended to all trust interests) by Law of Property Act 1925 ss. 137-8.

62 Land Registration Act 1925 s. 102 and the Land Registration Rules 1925 r.r. 11(1) and 229.

63 In accordance with the recommendations we made in our Report on Land Registration (1983) Law Com. No. 125.

3.19 The rule in Dearle v. Hall governs the priority of dealings with all choses in action. Priority of mortgages of interests under a trust of land is therefore governed by principles primarily applicable to personal property, rather than by principles primarily concerned with interests in land, a point we considered in general terms in paragraph 3.5. This seems at first sight a prime example of the unnecessary complexity of land mortgages, but we can see two reasons why it may be important either to preserve uniformity, or to ensure consistency, with personal property priority rules. The first is that it is, we believe, relatively common to mortgage equitable interests in mixed funds of land and other property. If this is the case then clearly it would be undesirable to have priority rules that gave different results when applied to different parts of the fund. Even if the different rules applying to different parts of the fund were consistent with each other, it could still be administratively inconvenient for mortgagees and others to have to operate two different systems simultaneously. However, an additional factor to bear in mind here is that the rules governing priority of mortgages of property other than land are themselves under review, as we explained in paragraph 1.4. This may be a good opportunity for adopting new rules for priority of mortgages of mixed funds. The second reason is that the rule in Dearle v. Hall governs the priority of all dealings with trust equitable interests, not just mortgages. If it is to continue to do so, then any new rule for mortgages must be consistent with it.

3.20 The rule in Dearle v. Hall itself has attracted considerable criticism.[64] It ranks mortgages according to the date on which notice of the mortgage is given to the trustees, so that a later mortgagee can gain priority over an earlier one by giving notice first. The only major qualification to the rule is that the later mortgagee must not have had notice of the earlier mortgage at the time when the loan secured by the later mortgage was made.[65] Otherwise, it is applied rigidly and can operate unfairly.[66] Also, although some details were clarified by the Law of Property Act 1925 sections 137-138, it is still uncertain how the rule applies in some circumstances.[67] Finally, the rule is designed to operate where the trustees are independent of the beneficiaries. This makes the rule somewhat inappropriate for dealing with mortgages of interests under a trust for sale, where it is likely that the mortgagor/beneficiary is also one of the trustees.

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64 R. M. Goode, The Modernisation of Personal Property Security Law (1983) Eighth Crowther Memorial Lecture.

65 Re Holmes (1885) 29 Ch. D 786.

66 See in particular the criticisms made by Lord Macnaghten in Ward v. Duncombe [1893] AC 369 at pp. 391 - 394. Similar criticisms were made in the House of Lords in B.S. Lyle Ltd. v. Rosher [1958] 3 All E.R. 597.

67 The difficulties are explained in Megarry & Wade at pp. 994-5 and 1003.

3.21 Tacking of further advances Priority between successive mortgages can be affected by the doctrine of tacking, in the sense that money lent by an earlier mortgagee after the creation of a later mortgage can rank for repayment ahead of loans secured by the later mortgage.[68] The doctrine of tacking was modified by the Law of Property Act 1925 section 94 and the Land Registration Act 1925 section 30: as a result, a mortgagee may tack further advances to rank in priority to later mortgages (and other encumbrances) only in the following circumstances:

(i) by agreement with the subsequent mortgagee, or

(ii) if he had no notice of the subsequent mortgage at the time of making the further advance in question, or

(iii) if his mortgage imposes an obligation on him to make the further advance in question.

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68 There are two other, allied, doctrines: tabula in naufragio (entitling a third mortgagee to take priority over a second mortgage by acquiring the interest of a first legal mortgagee) which was abolished by the Law of Property Act 1925 s. 94, and the similar but surviving rule in Bailey v. Barnes [1894] 1 Ch. 25 (see McCarthy & Stone v. Julian S. Hodge & Co. [1971] 1 WLR 1547).

There are several problems about these provisions. The basic one is whether, as a matter of policy, priority for further advances ought to be halted by the creation of a subsequent charge: there are tenable arguments to support the view that in some circumstances a mortgagee should enjoy priority in respect of all advances secured by that mortgage, whenever made.[69] Leaving aside this general policy point, there are a number of other difficulties:-[70]

(a) There is some uncertainty about what constitutes notice to a prior mortgagee of a subsequent mortgage for the purposes of the Law of Property Act 1925 section 94. There are two problems here. The first is section 94(2) which provides that if the prior mortgage was made "expressly for securing a current account or other further advances" then registration of a later mortgage as a land charge under the Land Charges Act 1972

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69 This point is discussed fully in the Report of the Law Reform Commission of British Columbia, Mortgages of Land: The Priority of Further Advances (1986) LRC 85 where it is recommended that mortgages to secure a running account or construction finance shall have priority for all further advances up to a maximum amount, regardless of notice of any subsequent charge.

70 For a full discussion of these difficulties see R.M. Goode, Commercial Law (1982) pp. 765-9; W.J. Gough, Company Charges pp. 402-3; and R.G. Rowley, "Tacking of Further Advances" (1958) 22 Conv. (N.S.) 44 at p. 49.

does not constitute notice of that later mortgage. If, however, the first mortgagee does in fact make a Land Charges Act search, then he is taken to acquire notice of any mortgage then registered. At first sight it may seem illogical to penalise the mortgagee who does search, but it is difficult to see how else to approach the problem: it is not feasible to require a mortgagee whose mortgage secures a running account to search every time a fresh advance is notionally made, nor is it fair to allow a mortgagee who does search to ignore notice he does in fact receive. The second problem is more easily resolved. It has been suggested that registration of a later charge in the Companies Registry[71] gives a prior mortgagee constructive notice for these purposes.[72] If this is correct, it puts mortgagees who make further advances in a very difficult position: it is no more feasible to search at the Companies Registry before each advance than it is to make a Land Charges Act search.

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71 Companies Act 1985 s. 395.

72 The point is discussed in R.M. Goode, Commercial Law (1982) at p. 766 note 58.

(b) In unregistered land, those who wish to give notice to a prior mortgagee may have difficulty in ascertaining the identity of the mortgagee if (as is likely to be the case) the prior mortgage is protected by deposit of title deeds and so not registered as a Land Charge. Subsequent mortgagees should be able to ascertain the identity of prior mortgagees when they investigate the mortgagor's title, but this is unlikely to be possible for holders of later non-consensual charges.

(c) Section 94 does not apply to mortgages substantively registered under the Land Registration Act 1925, but it does apply to mortgages protected on the register by notice, caution or notice of deposit. Registered mortgages are governed instead by the Land Registration Act 1925 section 30, which requires the registrar to notify the proprietor of a charge "before making any entry on the register which would prejudicially affect the priority of any further advance." Subsequent mortgagees are therefore relieved of the responsibility of serving notice on prior registered mortgagees, but must still serve notice on prior mortgagees whose mortgage is protected by notice, caution or notice of deposit.

(d) Land Registration Act 1925 section 30(3) provides that where it is noted on the register that a charge contains an obligation

to make further advances, subsequent registered charges take subject to any such further advances made. It is not made clear that subsequent protected charges will also take subject to the further advances.

(e) It is arguable that a default by the mortgagor releases the mortgagee from any obligation to make further advances, and hence the mortgagee cannot tack advances made after default.[73]

3.22 Consolidation A mortgagee who holds two or more mortgages created by the same mortgagor over different properties, has an equitable right to refuse to allow one mortgage to be redeemed unless the other or others are also redeemed.[74] It can apply even when the equities of redemption have become vested in different mortgagors; and even if the mortgages were originally granted to different mortgagees. This makes the doctrine a trap for purchasers of property subject to a mortgage, since there is no way of establishing whether the vendor has created mortgages over other property which may be, or later become, vested in the mortgagee of the purchased property. Even apart from this point, the value of the doctrine has been questioned. Megarry and Wade say at pp. 959-960:

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73 J.R. Lingard, Bank Security Documents (1985) para. 8.18.

74 For a full explanation of the conditions of exercise of this right see Megarry & Wade pp. 955-960.

> "In practice, the right to consolidate causes less trouble than might be supposed. But as a source of risk to an innocent purchaser it is a freak of equity; it is "not one of those doctrines of the Court of Chancery which has met with general approbation". There may well be doubts as to the wisdom of equity allowing a mortgagee who has made two distinct bargains, one good and one bad, to use the success of one to rescue him from the failure of the other."

The mortgagee's right to consolidate has been removed by statute since 1881[75] but only "if and so far as a contrary intention is not expressed" in any one of the mortagage deeds in question.[76] We believe it is the case that mortgage deeds invariably expressly exclude the operation of this section, thus retaining for the mortgagee the full right of consolidation.

C. Rights of mortgagor and mortgagee during the security in relation to the mortgaged property

3.23 Possession We have already explained that under a legal mortgage it is the mortgagee and not the mortgagor who is entitled to possession.[77] The same is probably true of an equitable mortgage of a legal estate.[78] The fundamental problem about this right to

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75 Conveyancing Act 1881 s. 17: see now Law of Property Act 1925 s. 93.

76 Law of Property Act 1925 s. 93(1).

77 Para. 3.4 above.

78 H.W.R. Wade, "An Equitable Mortgagee's Right to Possession" (1955) 71 LQR 204.

possession of the mortgagee is that it is not really what the mortgagee (and a fortiori the mortgagor) wants. Most mortgagees are now institutional lenders. They do not want to occupy mortgaged property for their own purposes, nor do they want to take possession in order to receive rents or profits from the land: this can be achieved more effectively and at less risk to the mortgagee by appointing a receiver.[79] What is required is not a right to possession but a remedy: in practice mortgagees take possession on default, for the purpose of obtaining vacant possession preparatory to exercising their power of sale. Nevertheless, the theoretical right to go into possession at any time and for any purpose remains.[80] The exercise of the right can of course be restricted by an express or implied term in the mortgage, but we understand that such contractual restrictions are not common.[81] There are statutory restrictions, which we consider in paragraphs 3.68-3.70 but they do not apply to all mortgages and

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79 Under Law of Property Act 1925 s. 101(1)(iii). By virtue of s.109(2) such a receiver is deemed to be the agent of the mortgagor.

80 Four-Maids Ltd. v. Dudley Marshall (Properties) Ltd. [1957] Ch. 317.

81 We understand that express restrictions used to be extremely rare, but are now included in some standard form Building Society mortgages. At one time it was fairly common to include in mortgages of residential property an attornment clause whereby the mortgagor was made tenant of the mortgagee (and thus entitled to possession) but as far as we know such clauses are no longer used. For the difficulties in inferring a term restricting the mortgagee's right to possession see Esso v. Alstonbridge Properties Ltd. [1975] 1 WLR 1474 and Western Bank Ltd. v. Schindler [1977] Ch. 1.

none of them is wholly satisfactory. It has been said in the Court of Appeal[82] that there is an equitable jurisdiction to withhold possession from a mortgagee who does not seek it bona fide and reasonably for the purpose of enforcing the security. However, it is difficult to reconcile this with the other authorities and the existence of such a jurisdiction remains doubtful.[83]

3.24 The traditional view is that no restriction on the mortgagee's right to possession is necessary, because a mortgagee will be discouraged from exercising the right capriciously or unscrupulously by the fact that a mortgagee in possession is liable to account strictly on the basis of wilful default. This means that the mortgagee must account not only for any rents or income actually received from the mortgaged property but also for what, but for his wilful neglect or default, the mortgagee might have received. However, in practice it does not mean that a mortgagor deprived of occupation will always receive some financial recompense. One problem is that a mortgagee who occupies the property himself is not liable to account for an occupational rent if the premises cannot be let.

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82 In Quennell v. Maltby [1979] 1 WLR 318 by Lord Denning MR at p. 323. There is some support for this statement in the judgments of the other members of the Court (Templeman LJ and Bridge LJ).

83 R.J. Smith, "The Mortgagee's Right to Possession - the Modern Law" [1979] Conv. 266; R.A. Pearce, "Keeping a Mortgagee out of Possession" [1979] CLJ 257.

In the nineteenth century cases that establish this principle the premises could not be let in the sense that any letting would be at a very low rent, either because the premises were in poor physical condition[84] or because a local trading slump had caused all rents in the area to fall.[85] In modern conditions, the premises may also be unlettable in a different sense, i.e. in the sense that it would depress the capital value of the premises to let them because any letting might result in the tenant acquiring statutory security of tenure. In such circumstances, a failure to let is clearly not wilful neglect or default, indeed it is as much in the interest of the mortgagor as in the interest of the mortgagee that the premises are not let. Nevertheless, if in such circumstances the mortgagee does in fact go into beneficial occupation himself, it is arguable that he ought to account to the mortgagor for any benefit he receives from that occupation.

3.25 A problem which is of greater practical importance is that in the circumstances in which the right to possession is now most likely to be exercised (to obtain vacant possession prior to sale by the mortgagee) a mortgagee is most unlikely to be liable to account for the period during which the mortgagor is deprived of possession. In these circumstances there is usually no question of the mortgagee either going

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84 Marshall v. Cave (1825) 3 LJOS 57.

85 White v. City of London Brewery Co. Ltd. (1889) 42 Ch. D. 237 at p. 247; See also Fyfe v. Smith 2 NSWLR 408.

into occupation or letting the property, and no question of the mortgagee having to account for any rent, for the reasons already given. This absence of rent liability means that there is no particular incentive for the mortgagee to keep the period of possession prior to sale as short as possible. Any such lack of urgency is encouraged by the fact that the liability of a mortgagee in possession to prevent deterioration of the property is not onerous.[86] Any delay in selling after the mortgagor has ceased occupation affects the mortgagor adversely in two ways. Firstly, the fact that premises have been vacant for some time often depresses their market value. Secondly, during this period not only is the mortgagor deprived of occupation without compensation, but also interest on the outstanding debt continues to accrue. This is particularly harsh on those mortgagors who have been made homeless or deprived of the premises from which they carry out business as a result of the mortgagee taking possession.[87]

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86 Fisher & Lightwood pp. 350-1. and Norwich General Trust v Grierson [1984] CLY para. 2306.

87 For further details of the effect on residential mortgagors of delay in a mortgagee's sale see J. Doling, V. Karn and B. Stafford, Report for the National Consumer Council, Behind with the Mortgage - Lenders, Borrowers and Home Loan Debt: A Consumer View, (1985) pp. 124-126.

3.26 Leasing powers A further consequence of the leasehold or quasi-leasehold nature of the mortgagee's interest is that it makes the entitlement to grant occupational leases complicated. Since the mortgagee has, or is deemed to have, a long lease which will terminate on redemption, neither mortgagor nor mortgagee has the power to grant leases binding on the other.[88] A statutory power of leasing is conferred on whichever party to the mortgage is in possession by the Law of Property Act 1925 section 99, but the statutory power can be, and almost invariably is, excluded or restricted by express provision in the mortgage deed.[89] As a result, a mortgagor in occupation and apparent control of the property usually has no power to grant even short term leases of the property[90], and any tenant under a purported tenancy is liable to be evicted by the mortgagee at will, even if the continued existence of the tenancy does not threaten, or impede enforcement of, the mortgage. A prospective tenant may

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88 For a full account see Megarry and Wade pp. 960-3.

89 Law of Property Act 1925 s. 99(13). Subsection (13) does not apply to mortgages of agricultural land: Agricultural Holdings Act 1986 s.100 and Schedule 14 paras. 12(1) and (2).

90 When a mortgagor grants a tenancy which he is not empowered to grant by s. 99 or by the mortgage deed, it takes effect as a tenancy by estoppel: see Megarry & Wade p. 963. For the argument that a mortgagee may become bound by an unauthorised tenancy if the tenant becomes a statutory tenant under the Rent Act see: P. Smith, "Statutory tenants and mortgagees" [1977] Conv (N.S.) 197 and [1978] Conv. 322-323.

fail to discover the existence of a mortgage in the circumstances where the Law of Property Act 1925 section 44(2)[91] precludes investigation of the landlord's title. Even apart from section 44(2), we believe that it is not normal practice for someone who takes a tenancy at a rack rent to investigate the landlord's title.

3.27 Insurance There are two distinct problems about insurance. The first is the very limited scope of the statutory power to insure: the Law of Property Act 1925 section 101(1)(ii) gives a mortgagee power to insure the mortaged property at the mortgagor's cost, in that the premiums are made a charge on the property carrying interest at the same rate as the mortgage debt. The statutory power applies only to mortgages made by deed, it is restricted to loss or damage by fire, and it is subject to further restrictions set out in the Law of Property Act 1925 section 108 which make it quite inadequate by modern standards.[92] It is invariably supplemented by express terms, and we suspect that it no longer fulfills the function of providing an acceptable minimum level of insurance of the property.

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91 Law of Property Act 1925 S.44(2): "Under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign shall not be entitled to call for the title to the freehold".

92 See P.B. Fairest, Mortgages (1980) 2nd ed. pp.118-119.

3.28 The second problem is whether insurance proceeds should be used for reinstating the mortgaged property or paying off the mortgage debt. In the case of loss or damage by fire, the present position is complicated. The Fire Prevention (Metropolis) Act 1774 section 83 entitles "any person interested" in a building destroyed or damaged by fire to require the insurance company to put the insurance proceeds towards reinstatement of the building, even if the proceeds are insufficient for a total reinstatement.[93] There is some doubt whether a mortgagor can rely on section 83 where the mortgagee has a contractual or statutory[94] right to insist that insurance proceeds are used to pay off the mortgage debt rather than to reinstate the premises.[95] However, even if such a contractual or statutory right of the mortgagee is effective against the mortgagor, it cannot affect the right of a stranger to the mortgage who is "interested" in the building to insist on reinstatement.[96] In addition to the uncertainty about the effect of these statutory provisions about reinstatement, two further criticisms

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93 MacGillivray & Parkington on Insurance Law (1984) 7th ed. paras. 1684 et seq.

94 I.e. under the Law of Property Act 1925 s. 108(4), which applies where the mortgagee has effected insurance under the powers conferred by that Act, or where the mortgagor is made liable to maintain insurance by the mortgage deed.

95 It is generally assumed in the standard property law text-books that the mortgagee's rights under LPA 1925 s. 108(4) are subject to the rights of interested parties to call for reinstatement under the Fire Prevention (Metropolis) Act 1774, s. 83; see e.g. Fisher & Lightwood p. 33. For the contrary view see MacGillivray & Parkington op. cit. para. 1650.

96 MacGillivray & Parkington op. cit. para. 1650.

can be made. First, they do not deal adequately with the problems that can arise where the mortgaged property is leasehold and/or forms part of a larger structure. In such circumstances there are obvious difficulties in allowing any one of several interested parties either to insist on or to prevent reinstatement of the whole. Secondly, they do not apply at all where the loss or damage was caused by something other than fire.

3.29 Repair The mortgagor is under no statutory duty to repair or otherwise preserve the condition of the mortgaged property, although the mortgagee does have a common law right of uncertain ambit to have the mortgaged property preserved from deterioration.[97] Mortgage deeds usually contain detailed express covenants by the mortgagor covering such matters. If it is thought desirable to have more statutorily implied covenants in mortgages, either to shorten mortgage deeds or to increase uniformity, then repair and preservation would be an obvious topic to cover.[98]

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97 Fisher & Lightwood p. 267.

98 The Standard Security introduced in Scotland by the Conveyancing and Feudal Reform (Scotland) Act 1970 includes extensive standard conditions concerning the physical condition of the mortgaged property: see Standard Conditions 1, 2 and 10(6) set out in Schedule 3 to the 1970 Act (reproduced in Appendix B to this paper).

D. Restrictions on mortgage terms

3.30 There are a number of different rules prohibiting or avoiding various types of mortgage term. They emanate from several different sources, and some of them apply only to some classes of mortgage. The multiplicity of rules, the overlap between them, and uncertainties in some of them, all contribute towards the complexity of this part of the law.

Equitable restrictions

3.31 The Courts have always exercised an equitable jurisdiction to strike out unacceptable terms of a mortgage. The basis of this jurisdiction is traditionally described by the not immediately self-explanatory statement that there must be no clog or fetter on the equity of redemption.[99] Even apart from the opacity of the label, there are a number of difficulties about what sort of term falls within this category. We outline these difficulties in the following few paragraphs.

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99 For a detailed explanation of what this covers see Megarry & Wade p. 964 et. seq.

3.32 Postponement of redemption Traditionally the Courts have viewed with suspicion terms postponing the mortgagor's right to redeem the property. However, it was established by the Court of Appeal in 1939[100] that such a provision will not be struck out unless it results in the right to redeem being made illusory, or is, when viewed in the commercial context in which the mortgage was made, "oppressive or unconscionable".[101] On the whole this principle operates well in relation to mortgages of freehold land, but prolonged postponements of the right to redeem leasehold property cause problems. It was held by the Privy Council in Fairclough v. Swan Brewery Co.[102] that a postponement of the right to redeem a twenty year lease until six weeks before the expiry of the term was void because it effectively prevented redemption. This is entirely consistent with the principle laid down in Knightsbridge Estates Trust Ltd. v. Byrne[103] which we have just explained. Nevertheless, it can be argued that different commercial considerations apply when the mortgaged property is a wasting asset, such as a term of years; certainly, Fairclough v. Swan Brewery Co.[104] is inconsistent with the earlier Court of Appeal

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100 In Knightsbridge Estates Trust Ltd. v. Byrne [1939] 1 Ch. 441, which was subsequently affirmed by the House of Lords on other grounds: [1940] AC 613.

101 Knightsbridge Estates Trust Ltd. v. Byrne above at pp. 456-7.

102 [1912] AC 565.

103 [1939] 1. Ch. 441.

104 [1912] AC 565.

decision in Santley v. Wilde[105], where a provision which did effectively prevent redemption of a leasehold interest was upheld for what were then, and we think would still be, regarded as sound commercial reasons.[106]

3.33 Acquisition of mortgagor's interest

Provisions giving mortgagees rights to purchase the whole or part of the mortgagor's interest in the property have also been invalidated on the ground that they prevent redemption. This principle had solidified into an inflexible rule applied to avoid all absolute or contingent rights or options to purchase. The House of Lords took the view that the rule was undesirably rigid as long ago as 1904[107], but felt unable to modify it, even "to prevent it being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms."[108] However, subsequent Court of Appeal decisions have adopted an approach that is markedly more flexible.[109] However desirable this may be, it leaves the authorities in a state of confusion.

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105 [1899] 2 Ch. 474.

106 Santley v. Wilde has sometimes been treated as an example of a collateral advantage subsisting after redemption (and so not inconsistent with Fairclough v. Swan Brewery Co.): see R. H. Maudsley and E. H. Burn, Land Law: Cases and Materials (1975) 3rd ed. p. 608.

107 In Samuel v. Jarrah Timber and Wood Paving Corporation Ltd. [1904] AC 323.

108 Ibid at p. 327 per Lord Macnaghten.

109 Lewis v. Frank Love [1961] 1 WLR 261; Alec Lobb (Garages) Ltd. v. Total Oil [1985] 1 WLR 173.

3.34 Collateral advantage during the mortgage It is now generally accepted that a provision conferring on the mortgagee some advantage in addition to repayment of the loan with interest is valid[110] during the subsistence of the mortgage, provided it is not unfair and unconscionable, in the sense of having been imposed in a morally reprehensible manner.[111]

3.35 Collateral advantage persisting after redemption A term conferring on the mortgagee an advantage that will continue after redemption falls foul of both the rule prohibiting restrictions on redemption and the principle we referred to in the preceding paragraph. There is ample clear House of Lords authority that such a term is void.[112] However, in Kreglinger v. New Patagonia Meat and Storage Co. Ltd.[113] the House of Lords declined to invalidate a term of the mortgage which gave the mortgagee a right of pre-emption over the mortgagor's products that was to continue after redemption. The House of Lords said that the right of pre-emption was not part of the mortgage transaction at all (although contained in the mortgage deed) but was a separate condition of the mortgagor obtaining the loan, and therefore fell outside the ambit of the principle. This may give a

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110 Provided, of course, that it is not caught by any of the other equitable rules referred to here.

111 Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84, approved by Dillon LJ in Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd. [1985] 1 WLR 173.

112 See for example Noakes & Co. Ltd. v. Rice [1902] AC 24 and Bradley v. Carritt [1903] A.C. 253.

113 [1914] AC 25.

commercially desirable flexibility to this area of the law, but it is not obvious that the collateral advantage in Kreglinger was severable in a way that similar provisions in earlier cases were not. Megarry and Wade take the view that the Kreglinger "severability" test is merely "a convenient but indefinable rule for dealing with such cases on their merits".[114]

3.36 We suspect that no court would now exercise the equitable jurisdiction we have just described in such a way as to invalidate a term in a commercial agreement where the parties were at arm's length. Nevertheless our impression is that the uncertainty about what the courts will consider to be a clog or fetter on the equity of redemption inhibits the development of novel forms of financing the purchase and development of land. For example, we believe that it casts doubt on the validity of "equity mortgages", where the mortgagee effectively becomes entitled to a fixed percentage of the capital value of the mortgaged property.[115] We doubt whether applying principles primarily developed in the nineteenth and early twentieth century in a very different commercial context is the best way of deciding whether such mortgages should be enforceable in this country today.

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114 Megarry & Wade p.971.

115 R. Ellison, "Indexed mortgages" unpublished paper delivered at Longmans Seminar on Mortgages, 11 March 1986.

3.37 The doctrine of restraint of trade and Articles 85 and 86 of the Treaty of Rome The common law doctrine of restraint of trade applies to mortgages[116] and many terms made void by the equitable principles we refer to in the preceding paragraphs are also void as unreasonable restraints of trade. The advantage of assessing the validity of such terms by using the doctrine of restraint of trade is that it involves applying a relatively simple test of reasonableness which takes into consideration not only the interests of the parties but also the public interest. There is also some scope for challenging mortgage terms on the ground that they infringe the competition provisions of the Treaty of Rome, i.e. Article 85, which deals with restrictive agreements, and Article 86, which deals with abuse of a dominant position.[117] It may be that, at least in the case of non-residential mortgages, it is more appropriate to deal with the validity of mortgage terms by applying such broad commercial principles rather than by using the equitable supervisory jurisdiction which tends to consider only the narrower context of the relationship between the two parties to the mortgage.

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116 Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd. [1968] AC 269.

117 For these Articles to apply it must be established that the provisions in quesion, viewed either individually or collectively, affect trade between member states in some way. See also EEC Reg. 84/83 OJ 1983 L 173/5, noted N. Green, (1983) 4 OGLTR 74, and V. Korah, Exclusive Dealing Agreements in the EEC (1984).

3.38 Consumer Credit Act 1974 sections 137-140

The court has a statutory jurisdiction to "re-open" any credit bargain it finds extortionate, which gives it wide powers to set aside or vary any term of any mortgage where the mortgagor is an individual.[118] By section 138 a bargain is only extortionate if it requires payments which are "grossly exorbitant" or if it "otherwise grossly contravenes ordinary principles of fair dealing". Although it is clear that this statutory jurisdiction is in addition to and not in substitution for the equitable jurisdiction, the extent to which "extortionate" differs from "unfair and unconscionable"[119] is uncertain. Clearly there is a significant overlap. This question was considered recently by Edward Nugee Q.C. sitting as a deputy High Court judge in the case of Davies v. Directloans Ltd., where he said:

> "Professor Goode, in his book, Introduction to the Consumer Credit Act 1974 (1974), p. 370, expresses the view that the word "extortionate" would seem to mean much the same thing as "harsh and unconscionable"; and the same view was expressed in the county court in Castle Phillips Finance Co. Ltd. v. Khan [1980] C.C.L.R. 1, 3. I do not agree. Section 138(1) contains a comprehensive definition of "extortionate" for the purposes of the Act, and it is neither necessary nor permissible to look outside the Act at earlier authorities to ascertain its meaning. In cases outside the Act,

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118 Consumer Credit Act 1974 s. 137(2). The powers are contained in s. 139(2).

119 See para. 3.20.

"a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience." see per Browne-Wilkinson J. in Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84, 110.

Under the Act the test is not whether the creditor has acted in a morally reprehensible manner, but whether one or other of the conditions of section 138(1) is fulfilled, and although it may be thought that if either condition is fulfilled there is likely to be something morally reprehensible about the creditor's conduct, the starting and ending point in determining whether a credit bargain is extortionate must be the words of section 138(1)."[120]

3.39 Insolvency Act 1985 section 103 Where the mortgagor is a company, the court has a jurisdiction to set aside or vary the terms of any extortionate credit transaction. The jurisdiction is similar to the Consumer Credit Act extortionate credit bargain jurisdiction, except that it is only exercisable in respect of a transaction entered into within three years before the day on which the company goes into liquidation or an administration order is made.

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120 [1986] 1 W.L.R.823 at p. 831.

3.40 Consumer Credit Act restrictions on mortgages securing regulated agreements Mortgages which secure regulated consumer credit agreements within the meaning of the Consumer Credit Act 1974 section 8 are subject to some miscellaneous provisions restricting their terms:-

Section 93 prohibits terms which require the rate of interest to be increased on default.

Section 94 entitles the mortgagor to repay[121] at any time, notwithstanding a term postponing the right to redeem.

Section 95 and the Consumer Credit (Rebate on Early Settlement) Regulations 1983[122] entitle the mortgagor to a rebate on premature repayment.

Section 173 makes void any term which is "inconsistent with a provision for the protection of the debtor ... or his relative or any surety contained in this Act or in any regulation made under this Act."[123]

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121 The right is to repay rather than to redeem prematurely. In most cases it amounts to the same thing, but not, for example, where the mortgagor is not entitled to redeem until it becomes known whether the contingent liability will become a present liability or not: In re Rudd & Son Ltd. (CA) The Times 22 January 1986.

122 S.I. 1983 No. 1562.

123 In addition, s. 105 and S.I. 1983 No.1553 regulate the content of mortgages to which they apply by requiring the inclusion in a specified manner of specified information about the loan agreement.

They are also subject to various restrictions on enforcement which we consider later in paragraphs 3.66 and 3.68.

3.41 A number of criticisms can be made of the application of these Consumer Credit Act provisions to land mortgages.[124] The first is that it is very difficult to work out which mortgages they cover. To discover whether a mortgage does secure a regulated consumer credit agreement (and so is caught by these restrictions) it is necessary to look at several different sections of the Act[125] and a mass of subordinate legislation,[126] all of which employ terminology peculiar to the Act. Since the terminology

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124 J.E. Adams, "Mortgages and the Consumer Credit Act 1974" (1975) Conv. (N.S.) 94.

125 Consumer Credit Act 1974 ss. 8, 12, 13, 16, 19, and 189(1).

126 Currently, the Consumer Credit (Exempt Agreements) (No. 2) Order 1985 No. 757, the Consumer Credit (Exempt Agreements) (No. 2) (Amendment) Order 1985 No. 1736, the Consumer Credit (Exempt Agreements) (No. 2) (Amendment No. 2) Order 1985 No. 1918, the Consumer Credit (Total Charge for Credit) Regulations 1980 No. 51, and the Consumer Credit (Increase of Monetary Limits) Order 1983 No. 1878.

is designed to apply to widely differing types of credit arrangement it is not always immediately obvious whether or how land mortgages are affected.[127]

3.42 The second criticism that has been made of these Consumer Credit Act restrictions is that they do not apply to the category of mortgage to which they were intended to apply. The Crowther Report[128] recommended that consumer credit protection, which was

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127 For a full account of which mortgages are covered by these Consumer Credit Act provisions see Adams op. cit. Briefly, they apply to mortgages where the borrower is an individual, the loan does not exceed £15,000, and the mortgage is not exempt. There are four categories of exemption:

(1) All building society and local authority mortgages, unless the loan is to finance a transaction other than the purchase or provision of dwellings on the mortgaged land, and the mortgagee has some connection with the transaction being financed.

(2) More limited categories of mortgage where the mortgagee is a body named in one of the exemption orders listed in footnote 126 supra. To date, this includes most insurance companies and (as from December 1985) some banks and finance houses. Named banks enjoy the same exemption for mortgages of dwelling houses as building societies have.

(3) Mortgages at a low rate of interest, provided the mortgagee has no connection with the transaction being financed.

(4) Mortgages where the mortgagee does have a connection with the transaction being financed and the loan is repayable in four instalments or less.

128 Report of the Committee on Consumer Credit (1971) Cmnd. 4596. ("the Crowther Committee"). The Consumer Credit Act 1974 partially implemented the recommendations of the Crowther Committee.

not intended primarily for land mortgagors, nevertheless should be extended to mortgages securing "loans for consumption purposes secured by second mortgages."[129] It has been argued that the raising of the monetary limit from £5,000 to £15,000[130] and the emergence of banks as a significant source of house purchase and home improvement loans have resulted in the Consumer Credit Act covering a category that is wider than that envisaged.[131] However, we understand that this criticism has now been partially met: since 1983 it has been possible for the Secretary of State to give some specified banks the same exemption from the Consumer Credit Act as building societies and local authorities enjoy.[132] We shall be interested to hear from lenders whether they consider that this will restore the coverage of Consumer Credit Act protection to the category of mortgage originally intended.

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129 Ibid. paras. 1.1.5 and 1.1.6.

130 By the Consumer Credit (Increase of Monetary Limits) Order 1983 S.I. 1983 No.1878.

131 S. Fielding, "Mortgages and the Consumer Credit Act" (1985) 274 EG 33.

132 The Consumer Credit Act 1974 empowers the Secretary of State to specify for exemption only

(a) an insurance company,

(b) a friendly society,

(c) an organisation of employers or organisation of workers,

(d) a charity,

(e) a land improvement company, or

(f) a body corporate named or specifically referred to in any public general Act.

We understand that it became possible to bring banks within this list for the first time in 1983, when The Income Tax (Interest Relief) (Qualifying Lenders) Order 1983 S.I. 1983 No. 1907 named some banks as qualifying lenders for the purposes of MIRAS.

3.43 A more fundamental point is whether it is still desirable for these particular mortgages to be singled out for this particular protection. The Crowther Committee took the view that some mortgagors were inadequately protected and therefore ought to be included in the consumer credit code. We have no evidence to suggest that such mortgagors are in any less need of protection now than they were when the Committee reported in 1971. However, if the over-all protection for land mortgages were to be changed on the lines of the proposals we make in Part 9, it might be feasible to remove land mortgages from the Consumer Credit Act 1974 altogether. This would achieve a significant simplification of the law.

3.44 Regulation of variable interest rates In most modern mortgages the rate of interest charged is entirely at the mortgagee's discretion and is variable unilaterally by the mortgagee at any time. At first sight it may seem surprising that any mortgagor or his legal adviser is prepared to accept this. The answer is of course that in the present state of the mortgage market competition is so fierce that there is little likelihood of any mortgagee moving its interest rates much out of line with those of its competitors. If it did do so, not only would it fail to attract new borrowers, but existing borrowers would seek to borrow money elsewhere at a lower rate of interest in order to redeem their existing mortgages. However, there is no guarantee that this situation will continue indefinitely. Mortgage finance may well cease to be as freely available as it is now, making it more difficult to re-mortgage. More importantly, if the secondary mortgage market develops in the way presently envisaged

(see paragraph 3.76) and mortgagees remain entitled to transfer their mortgages without the mortgagor's consent, a mortgagor will no longer be able to assume that its mortgagee will always be a stable, reputable institution anxious to continue lending in the same sort of market and so needing to remain competitive in that market. For these reasons we think it is important to consider now whether the law gives mortgagors adequate protection against arbitrary or unreasonable variations in interest rate. Can a mortgagor directly challenge either an increase in interest rate or a failure to lower a rate that was once a market rate but has not fallen in line with market rates? It could be argued that this comes within the jurisdiction to strike out terms of a mortgage that are unfair and unconscionable (paragraph 3.34 above) or the Consumer Credit Act jurisdiction to re-open an extortionate credit bargain (paragraph 3.38 above). However, neither of these jurisdictions is wholly appropriate. The extent to which the interest rate differed from market rates, and the circumstances of the variation, would have to be quite exceptional before there could be said to be anything "unfair and unconscionable" in the now accepted sense of the phrase.[133] There would be the same difficulty in establishing that the variation made the loan agreement

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133 "A bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience:" see per Browne-Wilkinson J. in Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84, 110.

"extortionate".[134] Also, both jurisdictions envisage consideration of the terms of the mortgage at the time when the terms are imposed: it is not clear how they would apply to a variation of a term that was expressly made variable in the original mortgage deed.

3.45 An inability to challenge directly an unacceptable variation in interest rate becomes less important if the mortgagor is free to redeem the mortgage whenever he is not satisfied with the interest rate. However, at present there are a number of obstacles to redemption. First, unless the mortgage secures a regulated agreement under the Consumer Credit Act 1974, the mortgagors' right to redeem may be postponed by provision in the mortgage deed (see paragraphs 3.32 and 3.40 above). Secondly, redemption

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134 Consumer Credit Act 1974 s. 138(1) provides: "A credit bargain is extortionate if it - (a) requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or (b) otherwise grossly contravenes ordinary principles of fair dealing." cf Davies v. Directloans Ltd [1986] 1 WLR 823 at p. 837 per Edward Nugee Q.C. sitting as a deputy High Court judge: "Counsel for the plaintiffs asked that, if the bargain was reopened, it should be on the basis that the proper rate of interest to charge was 18 per cent. Although I accept his submission that the court should be astute to protect borrowers, and indeed this is clearly the policy underlying the Act of 1974, I cannot regard the difference between the 18 per cent. which he submitted was proper and the 21.6 per cent. which the defendant actually charged as anywhere near large enough to render the latter grossly exorbitant."

and re-mortgaging may be expensive: the mortgagor may be required to pay the outgoing mortgagee interest in lieu of notice to redeem (see paragraph 9.12 below) and pay the new mortgagee's legal costs, valuation fees and (in registered land) Land Registry fees for registration of the new charge.[135] Also, there may be other financial disincentives: for example, it is often undesirable to redeem an endowment mortgage within the first few years of its creation because this usually involves surrendering the endowment policy, which may be uneconomic during the early part of the endowment term. Finally, as we have already pointed out, there may be a shortage of mortgage finance at the time when the mortgagor seeks to redeem and re-mortgage, so that he is unable to obtain the funds to do so. Overall, then, we do not think it is safe to assume that a mortgagor who is dissatisfied with his interest rate can always re-mortgage elsewhere.

E. Enforcement of mortgages

3.46 Defects in the remedies available The mortgagee's primary and most widely used remedies are to sue on the personal covenant to repay, and to sell the mortgaged property free from the mortgagor's interest. As far as we know, criticisms of these remedies relate only to how and when they become exercisable: we explain these criticisms in paragraphs 3.57-3.63. In the case of the other three remedies

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135 Land Registration Fee Order 1985 S.I. 1985 No. 359 para. 4. The abatement available for registration of a charge delivered with an application to register a transfer would of course not be available in these circumstances (Sch. 6 Pt. 1 Abatement 2 of the 1985 Fee Order).

(possession, foreclosure and appointment of a receiver) on the other hand, doubts have been raised as to whether the remedies should be available at all in their present form.

3.47 Possession As we pointed out in paragraphs 3.23-3.25, the mortgagee's right to possession is widely used as a remedy, but generally only for the strictly limited purpose of obtaining vacant possession in order to sell. Although in theory it could also be used as a means of preserving the security[136] we understand that in practice it rarely is, because it is easier and less risky[137] to appoint a receiver for such purposes. It can be argued, therefore, that it is unnecessary for a mortgagee to have a remedy of possession at all, except for the limited purpose of obtaining vacant possession for a sale.

3.48 Appointment of a receiver We suspect that since 1925 there has been a change in the function that some mortgagees require a receiver to fulfil, resulting in a blurring of the distinction between two different types of receiver. The Law of Property Act 1925 section 101(1)(iii) empowers a mortgagee to appoint a receiver of the income of the mortgaged property. There is a basic theoretical distinction between such a receiver ("an LPA receiver") and a receiver and manager

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136 Western Bank v. Schindler [1976] 3 WLR 341 at pp. 347-8 per Buckley L.J.

137 Because of the liability of a mortgagee in possession to account on the basis of wilful default: see para. 3.24 above.

of a company's assets, who is appointed by a debenture holder under a security which comprises or includes a floating charge over the assets of the company ("a debenture receiver").[138] Whilst the Law of Property Act 1925 empowers an LPA receiver merely to receive and apply the income from the mortgaged property,[139] a debenture receiver's function is to receive the charged assets themselves, and to manage them. Since these assets usually comprise the whole of the company's undertaking, this means in effect that the debenture receiver moves in and takes over the running of the business completely. However, express provisions in a mortgage deed can extend the powers of an LPA receiver or replace the statutory power to appoint with an express power to appoint a receiver with considerably wider powers. The effect of such provisions can be to give the receiver the same function in relation to the mortgaged land as a debenture receiver has in relation to the company's business. In other words the receiver becomes entitled to take over the entire management of the property by acquiring powers to take possession of

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138 The law and practice of debenture receivers is outside the scope of this Working Paper. It was recently examined in the Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd. 8558 ("the Cork Report"). Many of the recommendations made in that Report about debenture receivers were implemented in the Insolvency Act 1985: see in particular sections 1-11 (qualifications of debenture receivers and other insolvency practitioners), Chapter IV and Schedule 3 (powers and duties of debenture receivers and others).

139 In addition, a receiver can exercise the leasing powers conferred by Law of Property Act 1925 s.99: see s.99(19).

it, to sell, grant leases or mortgages of the whole or part of it, to carry out repairs and improvements to the property and even to initiate and carry out building works on it.[140] This function is far removed from that provided for receivers by the Law of Property Act 1925.

3.49 Agency of the receiver A notable example of the artificiality of mortgage law is the agency of a receiver. Although appointed by the mortgagee, for the sole purpose of enforcing the security for the mortgagee's benefit, the receiver is deemed to be the agent of the mortgagor and not of the mortgagee, even though the mortgagor has no say in his appointment, no power to direct or control his activities, and no power to terminate his appointment.[141] This is not a recent development. The Law of Property Act 1925 section 109(2) provides that a receiver appointed under the statutory power is deemed to be the agent of the mortgagor, and the same provision appeared in the Conveyancing Act 1881 and in Lord Cranworth's Act[142]

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140 We understand that such extended powers are rare in Building Society mortgages, but common in Bank mortgages, even where the mortgage is of residential property.

141 The agency is terminated by the mortgagor's bankruptcy or liquidation. If the receiver continues to act thereafter he becomes the mortgagee's agent if the mortgagee treats him as such, otherwise he is treated as a principal in his own right: Gaskell v. Gosling [1897] AC 575; see also American Express v. Hurley [1985] 3 All ER 564 at p. 568.

142 23 and 24 Vict. c. 145.

passed in 1860 "to give to ... Mortgagees and others certain Powers now commonly inserted in ... Mortgages."[143] The allied question of the accountability and agency of debenture receivers was recently considered by the Cork Committee on Insolvency Law and Practice,[144] and as a result of their recommendations the automatic agency conferred on LPA receivers has now been extended to debenture receivers and other administrative receivers.[145] This does not necessarily settle the question of whether LPA receivers should continue to be deemed to be the mortgagor's agent: for the reasons we gave in the preceding paragraph it may well be that receivers appointed under a fixed charge should be treated differently from debenture receivers. Nevertheless, it is clearly convenient in practice for even a fixed charge receiver to be able to act as the mortgagor's agent, and the only disadvantage we can see from the mortgagor's point of view is if it makes it more difficult for the mortgagor to prevent, and/or obtain compensation for, an improper enforcement of the security. If this is correct, then the important points to consider are whether a receiver's liability is as extensive as that of a mortgagee acting directly, and whether receivers are of sufficient standing to be as well worth suing as the mortgagees who appoint them. However, there may be other problems that we have overlooked, and we welcome comments from those involved in this area.

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143 The evolution of the receiver's agency is explained by Rigby L. J. in Gaskell v. Gosling [1896] I QB 669 at pp. 691-3 in his dissenting judgement which was subsequently approved by the House of Lords: [1897] A.C. 575.

144 Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd. 8558, Chapter 8.

145 Insolvency Act 1985 s. 50.

3.50 Foreclosure Foreclosure is the process by which the mortgagor's interest in the property is extinguished, and the mortgagee becomes owner in his own right.[146] Although it is not often used now, it is by no means obsolete and it still generates some fairly complicated case-law.[147] The applicable law was largely untouched by the 1920s' property legislation and remains obscure. At the very least it requires reform, and there are strong arguments for outright abolition.

3.51 Technically, foreclosure is anomalous in our existing land mortgage system, and would be even more so if the reforms proposed in Section 5 were implemented. It is the obviously appropriate remedy for enforcing property-transfer type mortgages, (i.e. where the mortgage consists of a transfer of the property to the mortgagee, leaving the mortgagor with a right to have the property transferred back on repayment[148]) where it simply extinguishes the mortgagor's right to redeem, leaving the mortgagee with an unencumbered title. Foreclosure is less appropriate

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146 For a detailed explanation see Fisher & Lightwood Chapters 21 and 22, and Megarry & Wade pp. 933-6.

147 E.g. Lloyds and Scottish Trust Ltd v. Britten (1982) 44 P. & C.R. 249.

148 Legal mortgages of land commonly took this form in England before 1926, and it is still the method of creating a mortgage of an equitable interest.

in the case of a mortgage by demise and, a fortiori, in a statutory form of mortgage such as the Formal Land Mortgage we propose in Part 5. In both cases, extinguishing the mortgagor's right to redeem does not result in the mortgagee becoming unencumbered owner; there remains outstanding in the mortgagor a legal title which must then be transferred formally to the mortgagee.[149]

3.52 A more serious objection is the potential unfairness of foreclosure. If, as in our system, there is a relatively cheap and simple alternative remedy in the power of sale, there are few legitimate reasons why a mortgagee would want to take the property itself. Apart from some special cases where the mortgagee is a local authority which we discuss in Part 9, foreclosure would seem to be an attractive remedy in two cases: either where the property is worth more than the total indebtedness, or where it has some particular value to the mortgagee (e.g. a development potential that the mortgagee is peculiarly able to exploit). In the first case the mortgagee is making a windfall profit at the mortgagor's expense, and no just legal system should permit it: our system has complicated and not wholly effective safeguards against it, which are described in paragraph 3.53 below. In the second case the mortgagee's advantage is not directly obtained at the mortgagor's expense, but there is obvious scope for abuse.

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149 Law of Property Act 1925 ss.88(2) and 89(2). For a detailed discussion of this point see Sykes on Securities pp. 19-20, 53-54, 124-125 and 287.

3.53 The most effective existing safeguard against the abuse of foreclosure is the Law of Property Act 1925 section 91 which enables the court to order a sale of the property in lieu of foreclosure. This is not wholly effective: although foreclosure can only be effected by court order[150], so all foreclosure matters do come before the court, section 91 enables the court to order sale only if requested by the mortgagor, or "any person interested either in the mortgage money or in the right of redemption."[151] This leaves the court powerless to act if, as is frequently the case, neither the mortgagor nor any subsequent encumbrancers attend the hearing of the foreclosure action.[152] If section 91 was amended to allow the court to order sale whenever it was in the interests of the mortgagor (or

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150 Fisher & Lightwood 382-3; Megarry & Wade 933.

151 Law of Property Act 1925 s.91(2).

152 Published statistics do not distinguish foreclosure from other mortgage actions, so no accurate figures are available. However, a survey carried out at Birmingham County Court revealed that approximately half the defendants in mortgage possession actions did not attend their hearing. J. Doling, V. Karn and B. Stafford, Mortgage Arrears and the Variability in County Court Decisions: A Survey of Cases at Birmingham County Court (1984) University of Birmingham C.U.R.S. Working Paper No. 95 p.21 and table 9. Anecdotal evidence suggests that the level of non-appearance in cases where foreclosure is also claimed is in line with these figures, and that the situation is similar in the High Court.

subsequent encumbrancers) to do so, it is difficult to think of any case in which it would not order a sale under the present law.[153] Also, the court could be faced with the difficult task of exercising discretion in favour of a defendant who was not present and therefore had not put forward evidence to support the exercise of the discretion in his favour.

3.54 Section 91 is however sufficiently effective to make foreclosure unpopular to the point of obsolescence. A danger of retaining rather than abolishing an obsolescent measure is its potential for abuse; this potential has been exploited in the case of foreclosure at least twice in the fairly recent past:

(i) It has been used to ensure that the mortgagee's enforcement action is heard in the High Court rather than the County Court.[154] Where the mortgaged property

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153 Foreclosure works to the advantage of the mortgagor if the debt exceeds the value of the property, and the mortgagee loses the right to sue for the balance by subsequently disposing of the property (see paras. 3.55 and 3.56). The court hearing the foreclosure application will of course have no way of knowing whether the mortgagee will subsequently be able to sue for any outstanding balance.

154 For the reasons suggested in Fisher & Lightwood p. 320 note (n) and E.L.G. Tyler, "Possession by a mortgagee" (1970) 120 New L.J. 808, 829. The Payne Committee Report on the Enforcement of Judgment Debts (1969 Cmnd. 3909) recommended that county courts should have exclusive jurisdiction in mortgage possession actions where the property is a dwelling house in order to make it easier and cheaper for mortgagors to attend the proceedings (paras 1409-27); it is an additional advantage to the mortgagor that County Court proceedings are cheaper, since costs are almost invariably added on to the mortgage debt.

consists of or includes a dwelling-house, then generally speaking[155] the County Court has exclusive jurisdiction outside Greater London over mortgage actions, unless the action is for foreclosure.[156] At one time it was possible to circumvent the exclusive jurisdiction by adding a spurious claim for foreclosure to the claim for the remedies genuinely sought. This was stopped in 1974: it was held in The Trustees of Manchester Unity Life Insurance Collecting Society v. Sadler[157] that the High Court does not have jurisdiction unless foreclosure is genuinely sought.

(ii) It has also been used to avoid the protection conferred on mortgagors by the Administration of Justice Act 1970 section 36[158] which, as originally enacted, did not apply where the action brought by the mortgagee was for foreclosure. The Administration of Justice Act 1973 section 8(3) was designed to circumvent this device by giving the court power to adjourn a foreclosure claim. It is

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155 Provided the net annual value for rating of the mortgaged property is within the county court limit: County Courts Act 1984 s.21(1).

156 County Courts Act 1984 s.21, replacing the Administration of Justice Act 1970 s.37(2).

157 [1974] 1 W.L.R. 770.

158 Described in para. 3.69 below.

only partially successful in that it applies only to instalment mortgages[159] and gives the court a more limited jurisdiction than it has where the claim is for possession preparatory to a sale.[160]

3.55 A further disadvantage of foreclosure is that in two senses, it is not final in effect. From the point of view of the mortgagor (and his guarantors and other creditors) it is not final in the sense that it does not extinguish the debt: a mortgagee remains entitled to sue on the personal covenant even after the foreclosure order has been made absolute, up until the time when he sells the property or otherwise puts it out of his power to return it to the mortgagor.[161] An allied point is that it does not even produce a final authoritative valuation of the property enabling the mortgagor to calculate precisely how much is still owed to the mortgagee. From the point of view of the mortgagee it is not final in the sense that the foreclosure can be re-opened after the order has been made absolute, entitling the mortgagor to have the property back on payment of all sums due. Foreclosure can be re-opened if the mortgagee does subsequently sue

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159 Lord Marples of Wallasey v. Holmes (1975) 31 P. & C.R. 94.

160 For a full discussion of this point see Fisher & Lightwood p. 327 and the article referred to in note 154 above.

161 Campbell v. Holyland (1877) 7 Ch. D. 166.

the mortgagor or his guarantors[162] for the balance of the debt[163] and also in other exceptional but ill-defined circumstances.[164] The uncertainty caused by this lack of finality contributes towards the unpopularity of foreclosure as a remedy.

3.56 The combination of the factors referred to in paragraphs 3.52-3.55 above means that foreclosure can be unacceptably arbitrary in effect. It is capable of producing an undeserved profit either for the mortgagee (if he manages to foreclose on a property worth more than the debt) or for the mortgagor (if, when the debt exceeds the value of the property, the foreclosing mortgagee inadvertently disposes of the property before bringing his action on the personal covenant).

3.57 When the remedies became exercisable The circumstances in which the mortgagee becomes entitled to exercise the primary remedies of sale and appointment of a receiver depend on the Law of Property Act 1925 sections 101 and 103, as varied by any express provision in the mortgage deed. These sections set up

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162 Lloyds and Scottish Trust Ltd v. Britten (1982) 44 P. & C.R. 249.

163 Hence the rule stated above, that the mortgagee cannot sue on the personal covenant if he is unable to restore the property to the mortgagor on redemption.

164 Campbell v. Holyland (1877) 7 Ch. D. 166.

a two stage procedure, whereby the remedies arise when "the mortgage money has become due"[165] but do not become exercisable unless and until there has been a default or breach of covenant sufficient to satisfy section 103 (as amended or replaced by express provision in the mortgage). The present function of this two stage procedure is not clear. The only distinction between the two stages that we can see is that by section 104(2) a purchaser from the mortgagee is concerned to see that the power of sale has arisen, but not that it has become exercisable. If the date on which the power "arises" marked the stage when, to an outsider, there is prima facie evidence of default, this would be logical. However, as we explain in the next paragraph, this is not really the case.

3.58 Even if it is necessary or convenient to have a preliminary "arising" stage, either for the protection of purchasers or for some other reason, it is unsatisfactory that it should occur "when the mortgage money has became due", because this is a date of no practical significance. In cases where the actual intention of the parties is that the capital lent will be repaid in full on a fixed date,[166] the mortgage money is due for the purposes of section 101

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165 Law of Property Act 1925 ss. 101(1)(i) and 101(1)(iii).

166 In residential cases, these will usually be endowment mortgages i.e where the monthly repayments made by the mortgagor comprise interest on the capital and premiums on a life assurance policy, the benefit of which is assigned to the mortgagee and which on maturity will provide the capital to repay the loan.

not on that date, but on an earlier, arbitrarily chosen, "legal date for redemption".[167] Traditionally this date was six months after the date of the mortgage; now it is often as early as the date on which the first monthly payment is due from the mortgagor. In other words, the mortgagor is artificially put technically in default as early as possible, for the sole purpose of making the powers arise. This not only contributes towards making the mortgage deed incomprehensible, it also defeats the object of having a two-stage procedure. The same sort of thing happens in mortgages where the capital is repayable by instalments: it has been held[168] that the money is due for the purpose of section 101 on the date on which the first instalment of capital is due (even if duly paid).[169] This is no more logical a date for triggering off a power to enforce the mortgage than the artificial "legal date for redemption": to add to the confusion, some instalment mortgages now specify a different (rarely later) date as either "the legal date for redemption" or the date on which the money becomes due for the purpose of section 101. In the third main type of mortgage, where the loan is made repayable on demand rather than on a fixed date or by specified

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167 I.e. the date on which the mortgagor is treated in law as entitled and required to redeem: thereafter, of course, the mortgagor continues to have an equitable right to redeem.

168 Payne v. Cardiff Rural District Council [1932] 1 KB 241.

169 H. Potter, (1932) 48 LQR 158.

instalments, the money becomes due when the demand is made. Since it is unusual for the mortgage deed to restrict the circumstances in which the mortgagee is entitled to make demand, it is (in theory at least) entirely in the discretion of the mortgagee when the powers arise. Again, it is difficult to see the point of a two-stage procedure in such circumstances.

3.59 From the mortgagor's point of view, the more important provision is section 103, which sets out three categories of event on the happening of which the powers, having arisen, become exercisable: paragraph (i) deals with default in repayment of capital, paragraph (ii) with default in payment of interest, and paragraph (iii) with breach of some other term of the mortgage. There are a number of problems about section 103, and about the way it is or can be amended so as to entitle a mortgagee to enforce the mortgage in the absence of any real, or any sufficient, threat to the security. We explain these in the following paragraphs.

3.60 Paragraph (i) of section 103 is generally regarded as defective and is invariably amended or excluded altogether. It makes the powers exercisable when "notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors" and there has been default in payment for three months after service of the notice. "Mortgagor" is defined in the Law of Property Act 1925 section 205 (i)(xvi) to include "any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate, interest

or right in the mortgaged property". It is thought that because of this, section 103(i) imposes on the mortgagee an obligation to serve notice not only on the mortgagor, but also on any second mortgagee (and possibly on all subsequent ones).[170] By excluding section 103(i) to avoid this trap, the useful provision that the mortgagor himself should be given notice is incidentally jettisoned.

3.61 There is a discrepancy between section 103(ii), which requires that interest "is", rather than "has been" in arrear, and section 103(iii), which requires that there "has been" rather than "is", some other breach. The principle that a breach of covenant to pay money is always remediable by payment of everything due is not unknown in other areas of law.[171] Nevertheless, it does not seem sensible to authorise the mortgagee to enforce on breach of any non-monetary obligation, however minor and even if fully remedied, but not on late payment of interest, however persistent.

3.62 More importantly, although under section 103 the mortgage cannot be enforced unless there has been some default or breach, there is no restriction on the mortgagee's power to exclude section 103. Thus an express term which entitles (or has the effect of entitling) the mortgagee to exercise its remedies in

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170 See Fisher & Lightwood p.364.

171 E.g. relief against forfeiture of leases for non-payment of rent.

the absence of any real threat to the security or default or breach is perfectly valid under our existing law.[172] A fortiori, the mortgage deed may validly entitle the mortgagee to rely on remedied breaches or defaults as a justification for enforcement. The only exception to this is where the mortgage secures a regulated agreement under the Consumer Credit Act 1974.[173] The Act sets up a default notice system which prevents mortgagees relying on remedied breaches and defaults: a mortgagee must serve a default notice on the mortgagor in order to "become entitled, by reason of any breach by the debtor ... of a regulated agreement "[174] to take possession of land or enforce any security. The default notice must specify the breach and the action required to remedy it (if it is capable of remedy); if it is duly remedied then it must be treated as not having occurred.[175]

3.63 A final criticism of the exercise of the mortgagee's remedies is that the power of sale continues to be exercisable even after the mortgagor has contracted to sell to a third party. Notwithstanding such a contract, the mortgagee may

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172 For the extent to which a court may be able to refuse a possession order in such circumstances see paras. 3.64-3.66 below. See also Consumer Credit Act 1974 sections 76, 98 and 129.

173 See note 127 above for an explanation of which mortgages come within this category.

174 Consumer Credit Act 1974 s.87.

175 Consumer Credit Act 1974 s.89.

subsequently contract with, and then sell to, someone else.[176] Although the occasions on which this occurs in practice will be very rare, such a situation did arise in the case of Duke v Robson.[177] Clearly, the fact that the exercise of the mortgagee's power of sale effectively leaves the mortgagor unable to complete is harsh insofar as it exposes the mortgagor to an action for breach of his sale contract.[178]

3.64 Protection of the mortgagor: extra-judicial enforcement. The mortgagor has a certain measure of protection against oppressive or premature enforcement if the mortgagee is required to obtain a court order in order to enforce the mortgage. The disadvantage, however, is that it can increase the cost of enforcement and protract the enforcement process. It is not just from the mortgagee's point of view that this is a disadvantage. It is in the mortgagor's interest that the costs of enforcement are kept to a minimum, since they are usually added on to the mortgage debt. Also, if the mortgagor has ceased to

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176 Always assuming that the mortgagee's power of sale has arisen and is exercised in good faith and with reasonable care: see Megarry & Wade pp. 938-940.

177 [1973] 1 WLR 257.

178 In these circumstances there is some doubt as to whether the rule in Bain v Fothergill (1874) LR 7 HL 158 will apply to limit the damages payable by the mortgagor for breach of contract. See Re Daniel, Daniel v. Vassall [1917] 2 Ch 405, Baines v. Tweddle [1959] 1 Ch 679, and The Rule in Bain v. Fothergill (1986), Working Paper No. 98.

occupy the property, it is usually in his interest that enforcement of the security is completed as quickly as possible, for the reasons we gave in paragraph 3.25. The question of whether mortgagees' remedies ought to be exercisable extra-judicially therefore deserves careful consideration.

3.65 At present, a mortgagee does not need to make an application to the court in order to exercise the power of sale or to appoint a receiver, provided the mortgage is made by deed. No statistics are available, but we believe that extra-judicial sale is by far the most common method of enforcing non-residential mortgages. In practice, however, the mortgagee will first have to obtain a possession order from the court unless the mortgagor is out of occupation or can be relied on to vacate the property on completion. The mortgagee is entitled to take possession without a court order[179] but is rarely willing to do so unless the property is vacant, mainly through fear of committing the criminal offence of using violence for securing entry.[180] It follows that the mortgagor who can contrive to remain in occupation of the mortgaged premises can ensure that a court decides whether the mortgagee is entitled to enforce the mortgage, whereas the mortgagor who is out of or relinquishes occupation cannot.

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179 Unless the mortgage secures a regulated agreement under the Consumer Credit Act 1974: see para. 3.66 below.

180 Criminal Law Act 1977 s. 6. This replaces the common law offences of forcible entry. Because of s. 6(2), it is no defence that the mortgagee is entitled to possession of the premises.

3.66 The remarks in the previous paragraph do not apply to mortgages which secure a regulated agreement under the Consumer Credit Act 1974:[181] they are "enforceable ... on an order of the court only".[182]

3.67 Protection of the mortgagor: the court's power to delay or prevent enforcement Once the matter is before the court, there is probably no inherent general jurisdiction to refuse or delay to order possession or sale or the appointment of a receiver, provided the mortgagee has established that the right or power is now exercisable according to the terms of the mortgage.[183] However, there are three sets of statutory provisions giving the court discretion in relation to limited classes of mortgage.

3.68 Regulated agreements under the Consumer Credit Act 1974[184] In these cases the court may if it "appears ... just to do so"[185] make a time order giving the mortgagor time to pay any arrears etc. or remedy any other breach.[186] In addition, it has power under section 135 of the Act to impose conditions or suspend the operation of any order made in relation to a regulated agreement. By this means it would be able to prevent enforcement of a mortgage in the absence of sufficient default.

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181 See note 127 above.

182 Consumer Credit Act 1974 s. 126. It is not clear whether enforcement includes taking possession (A.G. Guest and M.G.Lloyd, Encyclopaedia of Consumer Credit Law, General Note at para. 2.127) and appointment of a receiver.

183 But c.f. Quennel v. Maltby [1979] 1 WLR 318 and para. 3.23 above.

184 See note 127 above.

185 Consumer Credit Act 1974 s.129 (1)

186 Consumer Credit Act 1974 ss.129-130

3.69 Administration of Justice Act 1970 section 36[187] If the mortgaged property is or includes a dwelling house, and the mortgage does not secure a regulated agreement within the Consumer Credit Act 1974, then the Court has extensive powers to delay or withhold a possession order. There are several criticisms of these provisions:-

(a) The Court can exercise its discretion only if the mortgagee applies to it for a possession order: technically, therefore, the mortgagee can deprive the mortgagor of protection by electing to seek some other means of enforcement. In practice, of course, it is rarely feasible to do so if the mortgagor is in occupation and refuses to leave.[188]

(b) The discretion is to delay or withhold the possession order only, not any other remedy. In practice this usually prevents enforcement, but in theory it is still open to the mortgagee to proceed to exercise its power of sale notwithstanding the court's refusal to make a possession order. Since such a sale terminates the mortgagor's interest in the property, the purchaser presumably would have no difficulty in obtaining a possession order against the mortgagor after completion.

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187 As amended by the Administration of Justice Act 1973 s. 8.

188 See para. 3.65 above.

(c) The objective of section 36 is to empower the court to give time to a mortgagor who is in temporary financial difficulties but is likely to be able to make up any arrears within a reasonable time.[189] The Courts have had considerable difficulty in achieving this objective when they have had to apply section 36 to different types of payment obligation. The problem was partly solved by the amendment to section 36 which was made by the Administration of Justice Act 1973 section 8. Section 8 seeks to ensure that the court need only consider the likelihood of the mortgagor remedying defaults in the original payment obligation: this amendment was necessary because mortgage deeds commonly provide for the total outstanding loan to become immediately payable on any (or any specified) default, and of course a mortgagor who has been unable to keep up with interest or capital instalments is highly unlikely to be able to make premature repayment of the total loan.[190] But, even as amended by section 8, section 36 still does not give the court effective powers in the common type of bank

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189 Bank of Scotland v. Grimes [1985] 2 All ER 254 at p. 259 per Griffiths LJ.

190 It was held in Halifax Building Society v. Clark [1973] Ch. 307 that for the purposes of section 36 "any sums due under the mortgage" included the sums payable under such an accelerated payment clause. This was not followed in First Middlesbrough Trading and Mortgage Co. Ltd. v. Cunningham (1974) 28 P & CR 69.

mortgage where the mortgage secures indebtedness payable on demand.[191] It was only after considerable argument that it was held to be effective in two other common types of mortgage: first, where the capital was to remain outstanding indefinitely and there was a six month legal date for redemption,[192] and secondly in the even more common case of an endowment mortgage.[193]

(d) It is not immediately obvious from the wording of section 36 that it empowers the court to withhold possession where the mortgagor is not in default. In Western Bank Ltd. v. Schindler[194] the Court of Appeal held by a majority that section 36 does apply in the absence of default,[195] but there is still

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191 Habib Bank v. Tailor [1982] 1 WLR 1218. Not all mortgages where the loan is expressed to be repayable on demand are necessarily in this category: see S. Tromans, "Mortgagees: possession by default" [1984] Conv 91.

192 Centrax Trustees Ltd. v. Ross [1979] 2 All ER 952.

193 Bank of Scotland v. Grimes [1985] 2 All ER 254.

194 [1976] 3 WLR 341.

195 Megarry & Wade describe the dissenting opinion of Goff LJ as "more persuasive": p. 945. Both Buckley LJ and Scarman LJ in the majority had considerable difficulty in construing section 36 to achieve this result, but considered that it would make a nonsense of the law to do otherwise: see in particular [1976] 3 WLR 341 at pp. 352 and 355-6.

considerable uncertainty about whether the court can postpone possession indefinitely if there is genuinely no default or threat to the security.[196]

(e) Section 36 does not give the court discretion to withhold possession where the mortgagor has no immediate prospect of complying with the originally agreed payment schedule, but could pay instalments at a reduced level, perhaps comprising payment of interest only. This situation often arises, particularly following unemployment or marriage breakdown where the mortgagor can face an indefinite period of reduced income. In such circumstances, most reputable mortgagees will in practice accept reduced instalments or

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196 Royal Trust Co. of Canada v. Markham [1975] 1 WLR 1416. For the divergent views of the Court of Appeal in Western Bank Ltd. v. Schindler [1976] 3 WLR 341 see p. 352 per Buckley LJ, p. 356 per Scarman LJ and p. 362 per Goff LJ.

payments of interest only (if satisfied that the payments will be made),[197] but the court has no power to require them to do so.

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197 For example, a borrower may be entitled to Supplementary Benefit in respect of interest payments on:

i) a mortgage or other loan taken out for the purpose of acquiring an interest in the home, or

ii) sums borrowed, with or without security, for repairs and improvements to the home, or

iii) a mortgage for business purposes which is charged on the borrower's interest in the home where the borrower intends to sell the interest in the home to discharge business liabilities and the payments are essential to enable the interest in the home to be realised on reasonable terms (maximum period of six months).

Supplementary Benefit may also be payable in respect of maintenance, insurance and other outgoings. See Supplementary Benefit (Requirements) Regulations 1983 S.I. 1983 No. 1399 Part IV made under the Supplementary Benefits Act 1976 and the Social Security and Housing Benefits Act 1982. The Department of the Environment has encouraged local authorities to accept interest - only payments in some cases. See DOE Circular 78/77 and Code of Guidance on the Housing (Homeless Persons) Act.

The Department of Health and Social Security can make mortgage interest payments direct to lenders where the claimant's payments are in arrears. See The Supplementary Benefit (Claims and Payments) Regulations 1981 S.I 1981 No. 1525 regulation 16. See also D W Pollard (ed), Social Welfare Law, Section E. Chapter II Part IV. The issue of Supplementary Benefit payments in respect of mortgage interest has come under review recently: see Hansard (H.C.), 15 May 1986, vol. 97, Written Answers, cols. 525-6 and Hansard (H.C.), 25 June 1986, vol. 100, cols. 329-377.

3.70 Regulated mortgages under the Rent Acts The court may delay or prevent the enforcement of a mortgage created no later than 1974 of a dwelling which is let on a Rent Act regulated tenancy which is binding on the mortgagee.[198] As far as we know, few (if any) such mortgages are still subsisting.

3.71 Duty of the mortgagee and of the receiver in exercise of remedies The extent of the mortgagee's duty in relation to the exercise of remedies is uncertain, for two main reasons. First, there is a conceptual difficulty caused by the fact that the obligation owed by the mortgagee can be ascribed to different sources: there is possibly a duty in tort owed to unsecured creditors of the mortgagor,[199] there is a duty in tort and in equity owed to subsequent encumbrancers,[200] and a duty in tort, equity and contract owed to the mortgagor and to any guarantor of the mortgagor.[201] The extent to which the Courts will permit such multiplicity of sources to broaden the scope of a duty of care has been considered in several

198 For further details see A. Arden and M. Partington, Housing Law, (1983) paras. 2.35-2.37.

199 L. A. Sheridan & G. W. Keeton, Equity - Remedies of the Mortgagee to Enforce his Security (1985) 3rd ed booklet 9 p.23.

200 Fisher & Lightwood p. 368.

201 In addition, building societies have statutory duties under the Building Societies Act 1962.

recent cases in other contexts,[202] and their precise effect in the context of mortgages is not yet established.[203] Secondly, mortgagees may seek to limit their liability by express term in the mortgage deed: again, the effect of such exclusion clauses in mortgage deeds is in some doubt following case-law developments in other contexts.[204] The liability question is further complicated by the fact that the mortgagee can enforce the mortgage through the medium of a receiver: the receiver is himself under a duty towards the mortgagor, guarantors and subsequent encumbrancers

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202 See in particular Anns v. Merton London Borough Council [1978] AC 728; Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1.AC 520; Tai Hing Cotton Ltd. v. Liu Chong Bank [1985] 2 All ER 947 (P.C.).

203 In the most recent mortgage cases, Standard Chartered Bank Ltd. v. Walker [1982] 3 All ER 938 and American Express International Banking Corporation v. Hurley [1985] 3 All ER 564, the court considered the liability of a mortgagee to the mortgagor's guarantor as a matter of tort. Whether this is legitimate in view of the contractual relationship between the mortgagee and the guarantor is now put in doubt by the dicta of Lord Scarman in Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1985] 2 All ER 947 at p. 957.

204 J. R. Lingard, Bank Security Documents (1985) para. 11.26; Chitty on Contracts (1983) 25th ed. vol. 1 para. 875 at seq; American Express v. Hurley [1985] 3 All ER at 571 f per Mann J.; Tai Hing Cotton Ltd v. Liu Chong Bank [1985] 2All ER 947 (P.C) at p 959 d-f per Lord Scarman.

etc., and the mortgagee may acquire liability for his acts by directing or interfering with his activities.[205] There is a separate problem about the extent of the receiver's liability, which we discussed in paragraph 3.49.

Enforcement of equitable mortgages

3.72 Because of the Law of Property Act 1925 section 101, equitable mortgagees of a legal estate enjoy the primary remedies of extra-judicial sale and appointment of a receiver if the mortgage is made or accompanied by a deed. However, there is some uncertainty over precisely what it is that section 101 entitles an equitable mortgagee to sell. It has been suggested that because of section 104(1)[206] an equitable mortgagee can convey the legal estate in the mortgaged property,[207] but there are strong arguments in support of the view that only an equitable interest

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205 Standard Chartered Bank Ltd. v. Walker [1982] 3 All ER 938; American Express International Banking Corporation v. Hurley [1985] 3 All ER 564.

206 Law of Property Act 1925 s.104 (1): "A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as he is by this Act authorised to sell or convey or may be the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage".

207 In re White Rose Cottage [1965] Ch. 940 at p. 951 per Lord Denning MR.

can be conveyed to a purchaser.[208] To avoid this uncertainty over the extent of the statutory power of sale, it is common practice to include in the deed creating or accompanying the mortgage either an irrevocable power of attorney or a declaration of trust by the mortgagor, either of which enables the mortgagee to vest the legal estate in a purchaser.[209]

3.73 There are two additional aspects of the enforcement of equitable mortgages that we have already mentioned: first, the doubt whether an equitable mortgagee can take possession without a court order,[210] and secondly the disparity in the remedies of an equitable mortgagee and an equitable chargee.[211]

F. Other Matters

3.74 Mortgages of leaseholds: relief against forfeiture If a tenancy is brought to an end through forfeiture, any subordinate interests derived from the tenancy - including mortgages - end with it. In such circumstances the preservation of the security will depend upon the mortgagee's ability to obtain relief

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208 For an analysis of the arguments see: P. McLoughlin, "The equitable mortgagee's power to give legal title: nemo dat quod non habet?" [1983] City of London Law Review p.43.

209 See Fisher & Lightwood pp. 49-50.

210 See para. 3.23 above, and the article referred to in note 78 thereto.

211 See para. 3.8 above.

against forfeiture. The availability and form of relief are determined by (a) whether forfeiture is sought for non-payment of rent or on other grounds, (b) the statutory provisions under which relief is claimed, and (c) whether the action is brought in the High Court or County Court.[212] In cases where a lessor is seeking forfeiture either for non-payment of rent or on grounds other than non-payment of rent, a mortgagee may claim relief as an underlessee under section 146 (4) Law of Property Act 1925. Although there are other sources of relief in cases where forfeiture is sought for non-payment of rent,[213] section 146 (4) is the only statutory provision under which a mortgagee may claim relief against forfeiture on grounds other than non-payment of rent. It is in the latter context that many of the present problems have arisen. Firstly, it is unclear how far, if at all, the inherent jurisdiction of the Court to grant relief against forfeiture in such cases has survived the enactment of section 146.[214]

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212 For the statutory provisions governing relief see: Law of Property Act 1925 s.146, Supreme Court Act 1981 s.38, Common Law Procedure Act 1852 ss.210-212, County Courts Act 1984 s.138 (to be amended by Administration of Justice Act 1985 s.55 when this comes into force). On the question of inherent jurisdiction see: Shiloh Spinners Ltd v. Harding [1973] AC 691, Official Custodian for Charities v. Parway Estates Developments Ltd. [1985] 1 Ch 151, Abbey National Building Society v. Maybeech Ltd [1985] 1 Ch 190, Di Palma v. Victoria Square Property Company Ltd. [1985] 2 All ER 676, Smith v. Metropolitan City Properties Ltd. (1986) 277 E.G. 753, and Ladup Ltd v. Williams & Glyn's Bank plc [1985] 2 All ER 577.

213 See note 212 above.

214 See cases referred to at note 203 above and P.F. Smith, "An inherent jurisdiction to relieve against forfeiture - does it exist" (1986) New L.J. 11 April 1986 p.339.

Secondly, the ability of the Court to grant relief under section 146 is limited to cases where the lessor "is proceeding" and ceases as soon as the lessor has re-entered, yet a mortgagee will not necessarily be alerted that forfeiture proceedings are in progress.[215] Thirdly, section 146 relief is prospective only, taking the form of a new lease in favour of the mortgagee rather than a continuation of the existing lease with the mortgagee being substituted for the forfeited lessee.[216] This has the effect of making the mortgagee liable on the covenants of the new lease throughout the term of that lease, as a result of the privity of contract principle, the subject of our Working Paper No. 95.[217] Finally, a point that applies in all cases

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215 Rogers v. Rice [1892] 2. Ch. 170 and Belgravia Insurance Company Ltd v. Meah [1964] 1. Q.B. 436 and note 212 above. The position of mortgages in relation to forfeiture proceedings in the County Court will improve when s.55 Administration of Justice Act 1985 comes into force. Recent amendments to the Rules of the Supreme Court 1965 mean that a landlord who brings forfeiture proceedings in the High Court will be required to notify any person entitled to relief against forfeiture of whom he is aware: see The Rules of the Supreme Court (Amendment No. 2) 1986 s.l. 1986 No. 1187 (L.9) rr. 2 & 3.

216 Chelsea Estates Investment Trust Company Ltd v. Marche [1955] 2 WLR 139, Cadogan v. Dimovic [1984] 2 All ER 168, Official Custodian for Charities v. Mackey (No.1) [1984] 3 WLR 915 and (No.2) [1985] WLR 1308.

217 Landlord and Tenant - Privity of Contract and Estate: Duration of Liability of Parties to Leases (1986) Working Paper No. 95. The provisional conclusion of our Working Paper is that the principle should be abrogated.

where relief has been granted is that the rights and duties of both mortgagor and mortgagee with regard to the equity of redemption are far from clear.[218] In our Report on Forfeiture of Tenancies[219] we drew attention to the complexity of the existing law and recommended the introduction of a new statutory regime governing termination of tenancies. If these recommendations were implemented, the problems discussed above would be resolved.[220] Recent cases[221] have exacerbated the uncertainty surrounding the existing law and given increased urgency to the need for reform.

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218 Chelsea Estates case above and see: L.A. Sheridan, "Mortgages of leaseholds by way of legal charge: relief from forfeiture" (1955) 18 MLR 301.

219 Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies (1985) Law Com. No. 142 Parts II and III.

220 See Law Com No. 142 above Part X "Derivative Interests".

221 Cases referred to at notes 203 and 207 above and see: J. Cherryman Q.C. and J. Calvert, Forfeiture: time for relief? (1986) Blundell Memorial Lectures; D.W. Williams, "Relief and waiver in forfeiture" (1986) L.S. Gaz. 12 March 1986 p.767; Legal Notes "The right of a mortgagee to claim relief against forfeiture" (1986) 277 E.G. 1257; and S. Tromans, "Forfeiture of Leases: relief for underlessees and holders of other derivative interests" [1986] Conv. 187.

3.75 Rental purchase[222] This is a method of house purchase which has been described as "the factual equivalent of hire-purchase of goods".[223] In its basic form a rental purchase agreement consists of a contract for sale, with the purchaser occupying the property and paying the purchase price in instalments, pending completion on payment of the final instalment. There is very little evidence available but it appears that in this country rental purchase is used mainly in the context of poorer quality housing at the lower end of the market. Although rental purchase agreements are categorically different from mortgages, the two types of transaction have been equated on the basis that they both involve "the taking or retaining of an interest in land for the purpose of securing payment of a debt".[224]

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222 The term is used in the Report of the Committee on the Rent Acts (1971) Cmnd. 4609 ("the Francis Committee") p.112

223 B.M. Hoggett, "Houses on the never-never: some legal aspects of rental purchase" (1972) 36 Conv. (N.S.) p. 325; see also B.M. Hoggett, "Houses on the never-never - some recent developments" (1975) 39 Conv. (N.S.) p. 343.

224 Law Reform Commission of British Columbia, Security Interests in Real Property: Remedies on Default (1975). Working Paper No. 15 p.42. Compare also the position in Queensland where a purchaser under an instalment contract may, after paying at least one third of the purchase price, require the vendor to convey the property to the purchaser on conditions that the purchaser executes a mortgage in favour of the vendor: see W.D. Duncan and H.A. Weld, The Standard Land Contract in Queensland (1984) 2nd ed. Chapter 15, in particular pp 205-208.

This raises the question of whether any of our proposals for reform of land mortgages should be made to apply to rental purchase agreements. This has been done in other jurisdictions where rental purchase is widely used as a method of financing house purchase.[225] We do not know whether it is, or is likely to become, used in the same way in this country: so far, it has been better known here as a method of evading Rent Act protection.[226] However, we welcome comments from those involved in this area on whether there is evidence of, or potential for, further abuse. If there is, we suggest consideration should be given to whether measures designed to protect mortgagors could appropriately be extended to cover rental purchasers.

3.76 Transfer of the mortgagee's interest In general, the mortgagee is not required by law to obtain the mortgagor's consent to the transfer of his mortgage[227], but there are some exceptions to this rule. Thus, in the absence of an express provision in

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225 See the works referred to in note 224 above.

226 Its suitability for this purpose has been considerably lessened by Housing Act 1980 sections 88 and 89, which give the court wide powers to withhold possession when possession proceedings are brought against a person let into possession of a dwelling house under a rental purchase agreement.

227 Law of Property Act 1925 s.114; Land Registration Act 1925 s.33.

the mortgage agreement, Building Societies cannot successfully transfer without the mortgagor's consent except on a merger or transfer of engagements.[228] We understand that in practice express provisions are invariably included in Building Society mortgage deeds. A more recent exception is that under the Local Government Act 1986,[229] the prior written consent of the mortgagor to transfer by a local authority mortgagee is compulsory. We can see three reasons why the identity of the mortgagee may be important to the mortgagor, and why he may therefore justifiably object to the mortgage being transferred without his consent. First, there is the point about variable interest rates we discussed in paragraphs 3.44 and 3.45: if the interest rate payable under the mortgage is variable unilaterally by the mortgagee, the mortgagor will be anxious to ensure that a new mortgagee is as likely as the original mortgagee to vary the interest rate in line with fluctuations in market rates. Secondly, as we explained in paragraphs 3.57-3.62 many mortgages entitle the mortgagee to call in the loan at any time after a purely technical default - sometimes even in the absence of any default. For so long as the

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228 See: Wurtzburg & Mills, Building Society Law (1976) 14th ed pp. 186 and 197-199.

229 Section 7. We explain these provisions in more detail in paragraph 9.44.

mortgagee is a stable institution committed to remaining in the mortgage market in this country, the mortgagor can be reasonably certain that in practice the loan will not be called in in the absence of a real default or threat to the security. However, the position obviously changes if the mortgage is transferred to a less stable mortgagee, or to one not subject to the same market constraints. Finally, it will be apparent from the preceding paragraphs that our present system gives mortgagees wide discretion whether, when and how to enforce the mortgage following a default. It is well-documented that there are enormous discrepancies in the enforcement policies of different types of mortgagee.[230] Any mortgagor must therefore be concerned that his mortgage could be transferred to an institution which follows a very much more aggressive enforcement policy than the original mortgagee. Until recently, these points have had little practical importance because transfers of mortgage have been relatively uncommon. However, a secondary mortgage market is now developing in this country and wholesale dealings in mortgage assets seem

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230 See J. Doling, V. Karn and B. Stafford, A Study of Mortgage Possession Actions in Coventry County Court (1984) University of Birmingham C.U.R.S. Working Paper No. 96 pp. 6-9 and 76-78; and "When the mortgage goes through the roof", The Guardian 28 June 1986.

likely to become widespread. For this reason we think it is now desirable to consider whether the present protection for mortgagors in this position is adequate, and if it is not whether changes in the law could help to increase protection to an acceptable level.[231]

3.77 Transfer of the equity of redemption

Transfer of the equity of redemption was comparatively rare until one of the leading building societies introduced a scheme in February 1984 to enable property to be transferred from one borrower to another without the need to redeem the existing mortgage.[232] However, the alternative practice of discharge of old mortgage, sale free from mortgage and fresh mortgage is still more popular, owing to the problems inherent in a transfer of the equity of redemption. These problems

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231 On 11 June 1986 the Minister for Housing Urban Affairs and Construction announced the setting up of a joint Treasury/Department of the Environment Working Group to look at a range of issues in the emerging secondary mortgage market. This Working Group is required by its terms of reference to (inter alia):

"Report to Ministers and the Mortgage Finance Committee on:-

(a) what protection should be given to existing and new mortgagors; and

(b) how any protection should be given effect."

232 For further details see; M. Leaf, "Abbey National Building Society - transfer of equity scheme" [1984] L.S. Gaz. 1 Feb. 1984 p.242.

stem from the absence of privity of contract between the mortgagee and transferee and from the continuing liability of the original mortgagor. According to statute,[233] (and as a matter of general principle) the mortgagor may at any time transfer the property subject to the mortgage without the mortgagee's consent;[234] unless the transferee enters into direct covenants with the mortgagee this results in a lack of privity between the mortgagee and the transferee. The mortgagee will not be unduly concerned by this situation because he can sue the original mortgagor on his personal covenants[235] for any default by the transferee. It is the original mortgagor who will be most prejudiced, unless he protects himself by obtaining an indemnity covenant from the transferee. Such indemnity covenants are usually created on successive transfers of the equity of redemption so that a chain is produced. However, this solution is unsatisfactory because the disappearance or insolvency of a transferee will leave the original mortgagor or previous transferor without recompense for an action brought by the mortgagee regarding default by the current transferee.[236] The

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233 Law of Property Act 1925 s.95

234 In practice, this power is fettered either by an express provision in the mortgage, the Building Society rules, or in the case of registered land, by entry of a restriction.

235 These subsist for the duration of the mortgage.

236 These problems were examined by the Law Reform Commission of British Colombia in their report, "Personal Liability under a Mortgage or Agreement for Sale" (1985) LRC 84, in which they recommended that the mortgagee should be able to proceed directly against the current owner of the property, provided that he is under an obligation to indemnify the original mortgagor and the chain of indemnity is unbroken.

alternative of expressly releasing a mortgagor from liability can also cause problems: its success depends on the creditworthiness of the transferee, the creation of privity of contract between the transferee and the mortgagee and the adequacy of the wording of the release.[237]

3.78 Discharge of mortgages It is common practice for legal mortgages to be discharged by the mortgagee executing a statutory receipt pursuant to the Law of Property Act 1925 section 115 or the Building Societies Act 1962 section 37,[238] or a discharge in Form 53 in the case of a charge registered at H.M. Land Registry.[239] There are other methods of discharge[240]

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237 For a discussion of the wording of releases see: Precedents Editor's Notes [1982] Conv. pp.252 and 331.

238 See now the Building Societies Act 1986 Schedule 4.

239 Land Registration Act 1925 s. 35 and Land Registration Rules 1925 rr. 151 and 152. The discharge is completed by the registrar cancelling the appropriate entry in the register: s. 35.

240 Strictly, no formalities are necessary at all: in unregistered mortgages the discharge of the liabilities under the mortgage automatically discharges the mortgage (Law of Property Act 1925 s. 116 and Edwards v. Marshall-Lee (1975) 119 Sol. Jo. 506) and in registered charges the registrar may act upon any "proof of satisfaction of a charge which he may deem sufficient" (rule 151). Even if formalities are preferred for evidential purposes, it is not necessary to use the statutory receipt or Form 53: any deed releasing the mortgagor's liabilities will act as an effective discharge of the mortgage (Edwards v. Marshall-Lee, above).

but the advantage of using a statutory receipt or Form 53 is that, in the absence of fraud it appears to operate as conclusive evidence that all liabilities of the mortgagor have been discharged.[241] Also, if made by deed it constitutes sufficient evidence of payment in favour of a subsequent purchaser.[242] The Law of Property Act 1925 section 115 receipt differs from both the Building Socieites Act receipt and Form 53 in that it requires the payer to be named, and provides that if payment appears to have been made by someone other than the person immediately entitled to redeem, the receipt operates to transfer the mortgage to the payer rather than to discharge the mortgage. This has been the source of considerable confusion in the law, and can still operate as a trap in a routine conveyancing transaction.[243]

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241 Fisher and Lightwod p. 540.

242 Law of Property Act 1925 sections 68 and 69.

243 See for example Cumberland Court (Brighton) Ltd. v. Taylor [1964] Ch. 29, where estoppel had to be relied on to prevent a vendor taking a transfer of the mortgage over the property he had just sold as a result of inadvertently dating the receipt of the mortgage after the conveyance, the proceeds of which had been used to make payment to the mortgage.

PART 4: OUTLINE OF PROPOSALS FOR REFORM

4.1. In the following Parts we set out five proposals for reforming the law of land mortgages in order to achieve the simplification and rationalisation that we hope we have demonstrated is necessary. The first four present four different ways of dealing with the structure of land mortgages. Of these proposals Proposal I, which is the most radical, is the one we prefer. It is that all existing methods of mortgaging interests in land should be abolished, and that a new Formal Land Mortgage should be created for use over any interest in land. We put forward for consideration suggested rules for the registration, protection and priority of the new Formal Land Mortgage, and for the creation of informal mortgages if they are to continue to be recognised. We also make suggestions for the use of standard form(s) to be prescribed for some or all Formal Land Mortgages and for a new set of Standard Conditions to be implied in Formal Land Mortgages by statute. Proposal II differs from Proposal I in that it confines the use of the Formal Land Mortgage to legal estates in land, and preserves the existing methods of mortgaging and charging equitable interests, with some relatively minor reforms in relation to protection, priority and remedies. Proposal III is a less radical version of Proposal I. It is to abolish the mortgage by demise and rationalise the remaining methods of mortgaging land, in particular by re-defining the charge by way of legal mortgage to incorporate the features suggested for the Formal Land Mortgage in Proposal I. It puts forward as further reforms a simplification of the methods of creating equitable mortgages of a legal estate, and the

assimilation of equitable mortgages and equitable charges, and it incorporates the reforms in mortgages and charges of equitable interests put forward in Proposal II. Proposal IV, the least radical, is that there should be no change in the existing structure of mortgage law, but that some of the suggestions made in Proposal I about registration, priority, standard forms, prescribed terms and terms implied by statute should be applied to existing types of mortgage. Proposal V is in a different category from the other four proposals. It is for a series of reforms in relation to the rights and duties of the parties, the remedies of the mortgagee, and some miscellaneous points. It is primarily intended to be combined with Proposal I, but some or all of the reforms in it could be combined with any of the other Proposals.

PART 5: PROPOSAL I

A. A new Formal Land Mortgage

5.1. The simplest, and in our present view the best, solution to the problems of multiplicity of types of mortgage and inappropriateness of form is to abolish all existing methods of mortgaging land and create by statute a new form of mortgage to be used for mortgaging any interest in land. Such a radical simplification is not unprecedented. Scotland has already carried out a similar exercise: the Conveyancing and Feudal Reform (Scotland) Act 1970 dismantled a mortgage structure as complicated as the present English one by creating a new form of heritable security (the standard security) to supersede all previous forms of heritable security.[1]

5.2. It is central to our proposal that the attributes of this new mortgage (which in the rest of this paper we refer to as a "Formal Land Mortgage") should be defined by statute de novo, rather than by

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1 This followed the recommendations of the Report on Conveyancing Legislation and Practice (1966), Cmnd. 3118 of a Committee appointed in 1964 under the chairmanship of Professor J.M. Halliday. For the history of the legislation and further details of the 1970 Act see J.M. Halliday, The Conveyancing and Feudal Reform (Scotland) Act 1970 (1977) 2nd ed.

reference to pre-existing forms of mortgage or by analogy to any other legal relationship. Essentially, the effect of the Formal Land Mortgage would be that the mortgagor retains title to the mortgaged property and the mortgagee acquires a sui generis proprietary interest consisting of such rights in the mortgaged property as are thought necessary for the protection and enforcement of the security. We set out our suggestions for what these rights might be in paragraphs 5.21-5.28.

5.3. Method of creation. The method of creating a Formal Land Mortgage would have to be prescribed by statute. The obvious requirement, and the one we favour, is that it must be in writing and made by deed. Whether it ought also to be in a prescribed form, or contain prescribed terms, is a matter we consider later at paragraphs 5.29-5.44.

B. Informal Mortgages

5.4. Should they be recognised? In Scottish law, any attempt to create a security by any means other than (or falling short of the formal requirements for) the standard security is void. In other words, whilst the mortgagor remains personally liable to pay the debt or discharge the liabilities incurred, the mortgagee acquires no security (or other) interest in the property, and no right of recourse to it.[2] Such a solution is technically feasible in English law. It has the attraction of simplicity and neatness, and it

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2 Conveyancing and Feudal Reform (Scotland) Act 1970 s.9(4).

can be argued that it would cause no real hardship to mortgagees, who are, overwhelmingly, commercial organisations with access to competent legal advice. However, English law differs from Scottish law in that it has a long history of recognising and enforcing in equity property interests which for some reason such as lack of formality fail to acquire a legal status. Traditionally this has been utilised by lenders for the purpose of deliberately creating informal mortgages enforceable only in equity. We welcome views on whether there is still a demand for informal mortgages in this country. If, as we suspect is the case, there is such a demand we can see no compelling reason for failing to satisfy it, and we suggest that it could best be satisfied by making statutory provision for Informal Land Mortgages. An Informal Land Mortgage would arise:

(a) on an attempt to create a security over an interest in land by any means other than by Formal Land Mortgage; or

(b) where a purported Formal Land Mortgage failed to satisfy the requirements for creating a Formal Land Mortgage (for these purposes registration would be treated as a formal requirement in registered land: see paragraph 5.6)

provided that, in both cases, the purported security is in writing and constitutes in equity a specifically enforceable agreement to create a Formal Land Mortgage. At present, it is possible to create an equitable mortgage without any writing, but we believe that this is not often done in practice. In our Working Paper Transfer of Land: Formalities for

Contracts for Sale etc. of Land[3], the proposal was put forward that contracts for the disposition of an interest in land ought to be in writing: if this proposal is accepted, it would be anomalous if the same minimum formality did not apply to the creation of a mortgage. However, we welcome comments on this point, particularly from anyone who envisages that it could cause inconvenience or hardship if it was no longer possible to create a mortgage without writing.

5.5. Nature of the Informal Land Mortgage. Our provisional view is that the difference between Formal and Informal Land Mortgages should lie in the availability of rights of recourse to the security. What we suggest is that the Informal Mortgagee's principal right should be to have the mortgage perfected. When the only lack of formality is failure to register as a Formal Land Mortgage, this can be remedied by the mortgagee without any assistance. In other cases, it will be necessary for a Formal Land Mortgage to be created. This could be done either by court order on application by the mortgagee, or by exercise of a power of attorney. At the moment, a memorandum accompanying a deposit of title deeds often includes an irrevocable power of attorney whereby the mortgagee could execute a legal mortgage in its own favour as attorney for the mortgagor. We can see no reason why a mortgagee should not include such a provision in an Informal Land Mortgage if it wants to ensure that the security can be perfected without the assistance of the court.

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3 Transfer of Land Formalities for Contracts for Sale etc. of Land (1985), Working Paper No. 92.

C. Registration of mortgages of legal estates

5.6. Formal Land Mortgages in registered land. At present, legal mortgages of registered land take effect only in equity until they are substantively registered. It seems sensible to adopt a similar principle in relation to Formal Land Mortgages (at least where the mortgaged property is a legal estate.[4]) In other words, a Formal Land Mortgage should be registrable, and unless and until registered it should take effect as an Informal Land Mortgage and be protectable as a minor interest.

5.7. Formal Land Mortgages in unregistered land. A more difficult question is whether to extend the same principle to unregistered land. This would mean making all Formal Land Mortgages registrable as land charges, whether or not protected by deposit of title deeds. The advantages of doing so are that registration is a more efficient way of giving notice than holding title deeds, and an over-all requirement of registration facilitates the simplification of priority rules and removes a discrepancy between registered and unregistered land. For these reasons we favour making all Formal Land Mortgages registrable as land charges, particularly in view of the relatively low cost of

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4 We consider whether a different rule is necessary in relation to Formal Land Mortgages of equitable interests in para. 5.17.

doing so.[5] However, it would be a significant departure from the Land Charges Act scheme to make registration a formal requirement for the creation of a Formal Land Mortgage, and we do not think it is essential to our proposals that this should be done. Instead, we suggest that whilst all Formal Land Mortgages should be registrable as land charges (the obvious category would be Class C(i)) they should be classified as Formal Land Mortgages whether or not so registered. This enables Formal Land Mortgages to be fitted into the Land Charges Act scheme without making any changes which might have repercussions for other interests in land.

5.8. Informal Land Mortgages in registered land. We assume that if the Informal Mortgage is to be of any use to lenders it must be protectable against third parties. In registered land, the only options are substantive registration or protection by entry of notice, caution or notice of deposit of land certificate. Substantive registration is not appropriate for an informal interest, if only because it may not be made by deed. For reasons that we give in our forthcoming Third Report on Land Registration, we suggest that the notice of deposit should be abolished and that encumbrances such as informal mortgages should be protectable by notice or caution as appropriate.

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5 At present the fee for registration of a land charge is £1 (Land Charges Fees Order 1985 S.I. 1985 No. 358). Any additional cost to the Land Registry would of course also have to be considered.

5.9. Informal Land Mortgages in unregistered land. In unregistered land the only options are registration as a land charge or the operation of the doctrine of notice. Our provisional view is that the former is preferable, although we recognise that it would be a significant departure from current practice if all mortgages of unregistered land, no matter how informally created, had to be registered at the Land Charges Registry.[6] We explained in paragraphs 3.13 - 3.17 the complications in the rules governing priority of mortgages not registrable as land charges. These complications would disappear if all mortgages, whether formal or informal, were registrable. The fact that in the existing system equitable mortgages not protected by deposit of title deeds are registrable suggests that there is no difficulty in principle in applying the same requirement to Informal Land Mortgages. If they are to be registrable, we suggest it is made clear that the appropriate Class of land charge is C(iii) and not C(iv), to remove the doubts we referred to in paragraph 3.11.

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6 It has of course always been the case in registered land that all mortgagees of a legal estate, however informally created, must be protected by some entry on the Register in order to be binding on third parties. It is possible, but not likely, that a mortgage could be an overriding interest: see note 60 to paragraph 3.18 above.

D. Priority of mortgages of legal estates

5.10. The major advantage of adopting the simplified registration system outlined in paragraphs 5.6.-5.9. is that it makes it possible to adopt simpler priority rules without making major changes to the general rules of priority of proprietary interests. We set out these simplified priority rules in the following paragraphs: only those referred to in paragraphs 5.12 and 5.14 would require any change in the general law.

5.11 Registered Land. A Formal Land Mortgage of a legal estate will be registered, by definition. Under existing land registration principles it follows that any subsequent disposition by the registered proprietor will be subject to it, and it will rank for priority purposes according to its date of registration. An Informal Land Mortgage will be protectable by notice or caution, and if it is so protected then any subsequent registered disposition will be subject to it (unless, in the case of protection by caution, the caution is warned off[7]). If the proposals we make in our forthcoming Third Report on Land Registration are implemented, then priority between successive protected Informal Mortgages (and between them and any other interest protected by notice or caution) will depend on date of protection.[8]

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7 For the warning-off procedure see Ruoff & Roper pp. 735-738 and 813-814.

8 Subject to the special provisions governing rights under the Matrimonial Homes Act.

5.12. Unprotected mortgages in registered land. As a matter of general land registration principle, if a protectable mortgage is not protected, then any subsequent registered disposition for value is not subject to it, and (assuming the proposals we refer to in paragraph 5.11 are implemented) any subsequent interest protected by notice or caution takes priority over it. We can see no reason to suggest any further changes in these principles. However, priority between successive unprotected mortgagees is governed by the general equitable principles we discussed in paragraph 3.16.[9] Their present application is complicated and uncertain, and it is even less clear how they should apply to interests all of which should have been registered or protected on the register. It would be a significant simplification of the law if in this context the equitable priority rules could be replaced by a single statutory rule that unprotected mortgages take priority from their date of creation over all subsequent unprotected interests, subject to fraud or estoppel. We think such a rule is workable, even if it is not extended to interests other than mortgages (although clearly it would be simpler if it did apply uniformly). Also, we do not think it would operate unfairly, since any subsequent interest holder could at any time acquire priority by protecting or registering.

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9 See Barclays Bank v. Taylor [1974] Ch. 137.

However, there may well be difficulties that we have overlooked, and we welcome comments from anyone who can envisage problems that might arise if such a solution was adopted.[10]

5.13. Unregistered land. Formal and Informal Land Mortgages will be registrable as land charges of Classes C(i) and C(iii) respectively. Once registered they will be binding on all third parties and rank for priority purposes according to their date of registration.[11]

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10 It would also be feasible to adopt, as an alternative, the rule that unprotected mortgages rank in reverse date order; in other words, failure to protect a mortgage makes it void against a subsequent purchaser. This rule already applies in the Land Charges Act system, and it could be argued that it is a useful incentive to register or protect as appropriate. But it involves a more draconian approach to registration of title than traditionally has been adopted in this country. See also paragraph 5.14.

11 Mortgagees can of course vary priority by agreement between themselves. The mortgagee relinquishing priority may enter into a deed of variation or postponement in favour of the mortgagee gaining priority. In registered land variation effected by deed or by use of statutory form 51 can be entered on the register; for the procedure see Ruoff & Roper pp. 527-8. However, in unregistered land there is no procedure for altering priority on the face of the Land Charges Register.

5.14. Unregistered mortgages in unregistered land. At present, the consequence of failing to register a mortgage registrable as a Class C(i) or Class C(iii) land charge is that it is void against a purchaser of any interest in the mortgaged property. There are two objections we can see to applying these provisions unaltered to Formal and Informal Land Mortgages. First, the order of priority it would give between successive unregistered mortgages is the reverse of the order that would apply to successive unregistered and unprotected mortgages in registered land (whether or not the proposals we make in paragraph 5.12 are adopted). However, this inconsistency already exists in the present law. It is inherent in the different natures of the Land Registration and the Land Charges systems and we can see no way of removing it without making fundamental changes in one or other of the systems. The second objection is that it does nothing to eliminate the priority circle problems which we explained in paragraph 3.12. However, making all mortgages registrable does make it possible to adopt a solution to these problems pointed out in Megarry and Wade:

> "A lesson in lucid drafting may be taken from the Middlesex Registry Act 1708, s. 1, which provided that an unregistered assurance is void against a subsequent purchaser unless registered before the registration of the subsequent purchaser's assurance."[12]

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12 Megarry & Wade p. 1001 n. 3.

In other words, priority circles involving mortgages could no longer occur if the Land Charges Act was amended to provide, as an exception to the general rule, that a registrable but unregistered interest is void against a purchaser of a registrable interest unless registered before the registration of that subsequent interest. We suggest that, with an amendment such as this, the present provisions of the Land Charges Act should continue to apply to the priority of unregistered Formal and Informal Land Mortgages.

5.15. Scope of the pre-1926 priority rules in unregistered land. Since no mortgages will be unregistrable, all the priority problems we describe in paragraphs 3.13-3.17 will disappear.

E. Mortgages of equitable interests

5.16. It is part of our proposal that equitable interests in land should be treated in the same way as legal estates, in that they should be mortgagable only by using either a Formal or an Informal Land Mortgage. We explained in paragraphs 3.2-3.8 the complications that arise from mortgaging and charging equitable and legal interests by different methods. We think it is feasible to use the same method for mortgaging all interests in land, but it may be necessary to provide different rules for registration (and consequently priority) where the mortgaged property is an equitable interest rather than a legal estate.

5.17. Registered land. Since a mortgage of an equitable interest can affect the underlying legal estate[13] it is not wholly inappropriate that it should be mentioned on the register of the title of the proprietor of the legal estate. However, we think that the potential effect on the legal estate is too remote to justify substantive registration. Instead, our provisional proposal is that both Formal and Informal Mortgages of an equitable interest in land should be protectable by restriction if the equitable interest is a trust equitable interest (and so over-reachable) and by notice or caution if it is a commercial equitable interest.[14] The principal objective of requiring them all to be protected on the register is that it then becomes possible to adopt a simple priority rule: their priority depends on date of entry of the notice, caution or restriction. This means that the operation of the rule in Dearle v. Hall can be excluded. Priority between unprotected mortgages can be governed by the rules we propose in paragraph 5.12. We recognise that previous experience of protecting

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13 See for example Property Discount v. Lyon Group Ltd. [1981] 1 WLR 300. Note also that a charging order over an interest under a trust is protectable by notice or caution against the legal title: Charging Orders Act 1979 s. 3.

14 We explain the distinction between trust equitable interests and commercial equitable interests in paragraph 3.5.

mortgages of equitable interests by entry on a register has not been happy. In registered land it has been necessary since 1925 for notice of mortgages of trust (but not other) equitable interests to be entered in the Minor Interests Index. In 1983 we reported[15] that this system was seriously defective and rarely used, and we recommended that the Minor Interests Index should be abolished, leaving priority between these mortgages (and other dealings in trust equitable interests) to be dealt with by the rule in Dearle v. Hall.[16] This recommendation will shortly be implemented.[17] However, we believe that the system we propose in this paragraph will not have the defects suffered by the Minor Interests Index. The Minor Interests Index was complicated and confusing because it subjected mortgages of some equitable interests to a regime that applied to no other type of mortgage. The proposal we make in this paragraph would apply to mortgages of all equitable interests, and it would simply involve treating mortgages of equitable

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15 Property Law: Land Registration, (1983) Law Com. No. 125. Part V.

16 At the time of our Report, replacing the Minor Interests Index with protection by restriction, notice or caution on the title of the holder of the legal estate, as we now propose, would not have been satisfactory, because restrictions, notices and cautions do not affect priorty. It only now becomes feasible when allied to the recommendation we make in our Third Report on Land Registration that they should affect priority.

17 Land Registration Act 1986 Section 5.

interests in essentially the same way as any other land mortgage. There is one problem common to both the Minor Interests Index and the system we propose here: in the present state of the law neither deals satisfactorily with mortgages of interests in mixed funds of land and personal property (see paragraph 3.19). However, if any change is made in the rules governing priority of security interests in property other than land then it will anyway became necessary to reconsider the whole question of how to deal with priority of dealings with interests in mixed funds. We return to this point in paragraph 5.19.

5.18. Unregistered land. The principle that mortgages of equitable interests can affect the legal estate and therefore are properly registrable as land charges is already accepted where the mortgaged property is a commercial equitable interest.[18] We can see no fundamental objection to extending it to trust interests. The advantage of doing so is that it makes it possible to have the same rules for registering Formal and Informal Land Mortgages whether the mortgaged property is a legal estate or an equitable interest: in all cases they would be registrable as land charges, of Class C(i) (for Formal Land Mortgages) and Class C(iii) (for Informal Land Mortgages). This means that the same priority rules can apply whether the mortgaged property is a legal estate or an equitable interest, i.e. the proposals we make in paragraphs 5.13 and 5.14 will be equally applicable to mortgages of equitable interests. It also means that the rule in Dearle v. Hall will cease to apply. The only difference in registration between mortgages of

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18 Land Charges Act 1972 s.3(1).

equitable interests and mortgages of legal estates would then be that in the former, as the Land Charges Act system stands at present, registration would not be against the name of the mortgagor but against the name of the holder of the underlying legal estate.[19] This is already the case where an equitable mortgage of a commercial equitable interest is registrable as a Class C(iii) land charge;[20] we shall be interested to hear from those involved in mortgages of trust interests whether it would cause problems if it were to apply to such mortgages. Where trustees hold the legal estate (i.e. in a trust for sale or bare trust) we assume there would be no difficulty, since mortgagees already need to know the names of the trustees to give notice under the rule in Dearle v. Hall, but it may be more difficult in the case of settled land.

5.19 The proposals we make in the preceding two paragraphs clearly must remain provisional pending the outcome of the current review of security interests in property other than land which we refer to in paragraph 1.4. For the reasons we give in paragraph 3.19, if any change is made in the rules governing priority of securities over property other than land, then it will become even more important to have new rules governing priority of mortgages of equitable interests in land. As we explained in paragraph 1.4, a simultaneous review of priority rules in both areas provides the best possible opportunity for ensuring that the two systems are compatible.

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19 Barrett v. Hilton Developments Ltd. [1975] Ch. 237.

20 Property Discount v. Lyon Group Ltd. [1981] 1 WLR 300.

F. Summary of the new mortgage structure.

5.20. At this stage it may be helpful to have the effect of the proposals we have made in paragraphs 5.1-5.19 summarised in a table:

TYPE OF MORTGAGE	METHOD OF CREATION	NATURE OF MORTGAGED PROPERTY	METHOD OF PROTECTION	EFFECT OF FAILURE TO PROTECT	PRIORITY IF PROTECTED
FORMAL LAND MORTGAGE	BY DEED	LEGAL ESTATE	REGISTERED LAND: REGISTRATION	TAKES EFFECT AS INFORMAL MORTGAGE	DATE OF REGISTRATION
			UNREGISTERED LAND: REG. AS C(i) LAND CHARGE	VOID AGAINST PURCHASER FOR VALUE (BUT STATUS UNAFFECTED)	DATE OF REGISTRATION
		EQUITABLE INTEREST	REGISTERED LAND: TRUST INTEREST: RESTRICTION COMMERCIAL INT.: NOTICE/CAUTION	TAKES EFFECT AS INFORMAL MORTGAGE	DATE OF PROTECTION
			UNREGISTERED LAND: REG. AS C(i) LAND CHARGE	VOID AGAINST PURCHASER FOR VALUE (BUT STATUS UNAFFECTED)	DATE OF REGISTRATION
INFORMAL LAND MORTGAGE	IN WRTING	LEGAL ESTATE	REGISTERED LAND: NOTICE/CAUTION	VOID AGAINST REGISTERED & PROTECTED INTERESTS (BUT TAKES PRIORITY OVER LATER UNPROTECTED INTERESTS)	DATE OF PROTECTION
			UNREGISTERED LAND: REG. AS C(iii) LAND CHARGE	VOID AGAINST PURCHASER FOR VALUE	DATE OF REGISTRATION
		EQUITABLE INTEREST	REGISTERED LAND: TRUST INTEREST: RESTRICTION COMMERCIAL INT.: NOTICE/CAUTION	VOID AGAINST REGISTERED & PROTECTED INTERESTS (BUT TAKES PRIORITY OVER LATER UNPROTECTED INTERESTS)	DATE OF PROTECTION
			UNREGISTERED LAND: REG. AS C(iii) LAND CHARGE	VOID AGAINST PURCHASER FOR VALUE	DATE OF REGISTRATION

G. Nature of the Formal Land Mortgage

5.21 The mortgagee's interest As we explained in paragraph 5.2, we propose that a Formal Land Mortgagee should have a sui generis proprietary interest in the mortgaged property, and that the rights comprising this interest should be specified by statute. These rights should be the minimum necessary to ensure that the mortgagee can preserve the property against deterioration during the security, and can realise the security should it become necessary to have recourse to it in order to recoup the indebtedness. The question of precisely what rights are necessary to satisfy these criteria is one on which we are particularly anxious to receive comments. The proposal we put forward for consideration is that they should be limited to the following rights, which should be expressed to be exercisable only bona fide for the purpose of protecting or enforcing the security:-

(a) a right to carry out repairs to the property, with ancillary rights of entry;[21]

(b) a right to insure the property against such risks and for such sums as the mortgagee reasonably decides;

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21 This will not of course be appropriate where the mortgaged property is an equitable interest rather than a legal estate.

(c) a right to appoint a receiver of the income of the property, broadly in the terms of the power at present conferred on a mortgagee by the Law of Property Act 1925 sections 101 and 109;

(d) a right to sell the property, broadly in the terms of the power of sale at present conferred by the Law of Property Act 1925 s.101;

(e) a right to take possession of the property for the purpose of exercising the right of sale.[22] If the mortgagee has a right to appoint a receiver, we do not think it is necessary for there to be a right to take possession for the purpose of protecting (as opposed to enforcing) the security, but we welcome comments on this point.

5.22 Some mortgagees may want further rights in the mortgaged property in addition to those specified as attributes of the Formal Land Mortgagee's proprietary interest. Whether there should be any restriction on their freedom to contract for such additional rights is essentially a question of mortgagor protection and we consider it in that context in paragraph 9.6 in Proposal V. We also consider there the question of statutory restrictions on the exercise of the mortgagee's rights.

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22 This right also will not be appropriate where the mortgaged property is an equitable interest rather than a legal estate. For further consideration of the right to possession see paras. 9.6(c) and 9.16-9.17.

5.23 We have not included a right of alienation in the list of rights in paragraph 5.21, since as a matter of general principle a Formal Land Mortgagee will be free to dispose of its interest in the mortgaged property in the same way as anyone can dispose of any proprietary interest. We do however consider in paragraph 9.44 as part of Proposal V whether there should be any statutory restriction on the mortgagee's right to transfer the mortgage without the mortgagor's consent.

5.24 It may be useful at this point to note which rights a legal mortgagee has in the present law but a Formal Land Mortgagee would not have under this proposal. Instead of having an inherent right to possession by virtue of the mortgagee's estate, the Formal Land Mortgagee would have only the very limited right described in paragraph 5.21(e) above. The Formal Land Mortgagee would have no inherent right to grant leases of the mortgaged property, since the mortgage would not create an estate out of which leases could be granted. Since in our proposal the mortgagee does not have any power of managing the property (as opposed to preserving its value or realising it) an inherent right to grant leases is anyway not appropriate.[23] Also, the Formal Land Mortgagee would

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23 See further paragraphs 5.27(b) and 9.6(a) on the mortgagor's power to grant leases and the extent to which these powers should be variable by contrary provisions in the mortgage deed.

have no right of foreclosure. We set out in Proposal V at paragraphs 9.19-9.27 our proposals for abolishing or reforming the right of foreclosure. If it is decided that foreclosure should be retained in a modified form rather than abolished, then it will be necessary to add the right to foreclose to the rights we list in paragraph 5.21.

5.25 Documents of title An important question to consider is whether a Formal Land Mortgagee should have a statutory right to possession of documents of title. At present a first mortgagee has such a right to possession of documents "as if his security included the fee simple".[24] This statutory right is historically explicable but it is not necessarily appropriate for it to continue to apply where the mortgagee neither has nor is treated as having such a title vested in him. This raises two different questions on which we invite comments: first, should a first Formal Land Mortgagee have a statutory right to possession of documents?; secondly, if not, would it be desirable nevertheless for mortgagees to continue to hold documents in practice? If all protection and priority issues depend upon registration rather than possession of documents, then, in strict terms, possession of documents as a method of protection becomes unnecessary. However, there are a number of reasons why mortgagees may wish to hold documents and

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24 Law of Property Act 1925 section 85(1)

should remain free to contract to do so. It has been argued that retention of documents of title serves to inhibit fraud.[25] This argument would carry less force in registered land, where all Formal and protected Informal Land Mortgages would appear on the face of the land/charge certificate, than in unregistered land where a mortgagor might attempt to deceive successive mortgagees by presenting a bundle of deeds which would not reveal the existence of prior mortgages. Mortgagees may also wish to retain possession of documents to facilitate realisation of the security should the need arise.[26] As against these propositions it should be noted that sales by mortgagors far outnumber those by mortgagees, and any delay by mortgagees in relinquishing possession of documents adds significantly to the time and cost involved in residential conveyancing. Also, storage of documents of title represents a significant problem for some mortgagees.[27] A further point concerns Land

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25 The Second Report of the Conveyancing Committee (1985) para. 4.60

26 J. R. Lingard, Bank Security Documents (1985) para 10.14.

27 See the evidence given by the Halifax Building Society to the Conveyancing Committee. "It has been calculated that the Society would require additional storage space of over one and a half miles if there were an increase of one tenth of an inch in the bundle of title deeds." The Second Report of the Conveyancing Committee (1985) p.59.

Registry practice; at present during the currency of a registered charge the land certificate is deposited at the Land Registry whilst a charge certificate is issued to the mortgagee. We welcome the views of consultees as to whether (a) the existing practice should be continued or (b) the mortgagor should be entitled to the land certificate while the charge is outstanding, and, if so, whether charge certificates should continue to be issued.

5.26 The mortgagee's duties A mortgagee's duties are concerned mainly with enforcement of the mortgage; we deal with these separately in paragraphs 9.15 -9.40 below.

5.27 The mortgagor's interest If the mortgagee has only the limited rights listed in paragraph 5.21, the mortgagor's inherent rights will be correspondingly increased. In particular:-

(a) possession: the mortgagor will have a right to possession, terminable only by (a) the mortgagee extinguishing the mortgagor's interest by a sale in exercise of the power of sale (paragraph 5.21(d)), or (b) the mortgagee exercising the right to obtain vacant possession in order to sell (paragraph 5.21(e)).

(b) Power to grant leases: if the mortgagee neither has nor is treated as having a leasehold estate, then the mortgagor is left

with an inherent power to grant leases.[28] However, as a matter of general principle, any lease granted after the mortgage will be subject to the mortgage (assuming the mortgage is duly registered). This will mean that whilst the mortgagee will not be entitled to object to the mortgagor granting leases, it will be able to sell the property free from any subsequent lease by exercising the power of sale.[29] Our provisional view is that this is more satisfactory than the situation under the present law that we described in paragraph 3.26. It gives the tenant some (albeit very limited) protection against eviction, in that the lease cannot be terminated unless and until the power of sale is exercised. On the other hand it does not in any way affect the value of the security to the mortgagee, nor does it impede or increase the cost of enforcement. The only disadvantage that we can see in leaving the mortgagor with this

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28 Or, where the mortgaged property is an equitable interest, create any other derivative interest.

29 An analagous situation exists in relation to a mortgagee's power of sale in cases where the mortgaged property is a dwelling house which was occupied by the mortgagor at the time of the mortgage but which has subsequently been let on a regulated tenancy: Rent Act 1977 (as amended by the Housing Act 1980), section 98, and Schedule 15 Part II case 11 and Part V para. 2(e).

limited inherent power to grant leases without conferring any power to grant leases on the mortgagee, is that it means that both parties must concur in creating a lease that will be secure against the mortgagee. We appreciate that the Law of Property Act 1925 section 99 was intended to prevent such a situation arising, but we suspect that in practice at the moment concurrence of both is usually needed anyway, because section 99 is so often excluded or varied. In theory at least, it does not seem to us unreasonable to require the concurrence of both parties, since the interests of both are affected. We would be interested to hear from lenders whether they would be satisfied with the distribution of leasing powers we describe in this paragraph, or whether they would, if faced with such a situation, seek to alter it by express provision in the mortgage deed (assuming this was possible).

5.28 Interest of a mortgagee under an Informal Land Mortgage As we explained in paragraph 5.5., we propose that an Informal Mortgagee's principal right should be to have the mortgage perfected. Pending perfection, however, an Informal Mortgagee is still concerned to ensure that the security is protected. Accordingly, we suggest that an Informal Mortgagee should have the rights of repair and entry and of insuring referred to in paragraph 5.21 (a) and (b).

H. Form of Formal Land Mortgage

5.29 Standardisation We do not consider it essential that a Formal Land Mortgage should be required to be in any particular form, provided that it is made by deed. However, the introduction of a uniform method of mortgaging interests in land would provide a good opportunity for establishing some degree of standardisation of mortgage forms. This was done in Scotland. When the new standard security was introduced to replace all other methods of creating security interests in land, prescribed standard forms were also introduced and standard conditions were provided to be incorporated in all standard securities.[30] This followed the recommendations of the Halliday Committee,[31] who considered that there was sufficient uniformity in the forms of security then in use by lenders in Scotland to make it "practicable, after consultation with the parties principally concerned, to adjust a form of Statutory Security and to prescribe by statute standard conditions with regard to those matters which would be of general application and acceptable to both lenders and borrowers."[32] We set out the relevant part of the Halliday Report in full in Appendix B.

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30 Conveyancing and Feudal Reform (Scotland) Act 1970, the relevant parts of which are reproduced as Appendix B to this paper.

31 Report of the Halliday Committee on Conveyancing Legislation and Practice (1966) Cmnd 3118.

32 Cmnd 3118 para. 121.

5.30 The Royal Commission on Legal Services advocated standardisation of mortgages in this country in 1979:

> "We think that mortgages also are ripe for standardisation ... every mortgage contains provisions which can run to 20 or 30 pages all to the same purpose but all slightly different. The desire of the individual draftsman to keep his own wording sustains unnecessary diversity. Every building society, although performing precisely the same function as every other building society, insists at present on having forms of mortgage which are similar to, but not identical with, the forms of every other building society. We think that professional pride must give way to simplification. In the case of residential property in particular there is no reason why a statute should not lay down short and simple provisions applying in all transactions so that the forms of mortgage may be reduced to a minimum and difficult questions of construction eliminated."[33]

More recently, the Conveyancing Committee considered the question again and found that even in the relatively homogeneous area of building society mortgages there could be serious difficulties in standardising mortgage deeds.[34] Nevertheless, the Committee strongly recommended that building societies and other lenders should standardise their mortgage deeds and other documents,[35] and made an additional recommendation that "failing adoption of standardised mortgage deeds, a less significant but still useful simplification would be standard mortgage formats

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33 Final Report of The Royal Commission on Legal Services (1979) Cmnd 7648 Annex 21.1. para. 14.

34 Second Report of the Conveyancing Committee, 1985; paras. 6.39-6.40 and 7.19-7.20.

35 Ibid para. 9.31

(perhaps a standard front page, with the relevant set of the numerous varieties of conditions attached in a separate booklet)".[36] Following this recommendation six building societies formed a Committee to investigate whether a mortgage deed acceptable to each of the six societies could be devised. A short form of deed has now been agreed and we set out a copy of it in Appendix A.

5.31 Methods of Standardisation It is evident from the sources we refer to in the preceeding paragraphs that there are two avenues of approach towards standardising mortgage deeds. The first is to ensure that, so far as possible, the principal terms of the mortgage are presented in a uniform layout to make it easier for those who have to complete the documents and for those who have deal with them subsequently. The second is to introduce some degree of uniformity into the content of mortgage terms, especially into the way in which commonly occurring mortgage terms are expressed, by devising standard conditions to be incorporated into mortgage deeds. These two approaches are of course neither mutually exclusive nor necessarily dependent on each other. We deal with them separately in the following paragraphs.

5.32 Prescribed standard form We believe it is possible to produce a standard form of Formal Land Mortgage appropriate for all types of mortgage.[37] It

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36 Ibid para. 9.32.

37 Provided the mortgage secures the mortgagor's indebtedness: third party securities and guarantees would require separate treatment.

would, of course, have to be very short. We envisage a short form of deed with a standard layout, on the lines of the building society form set out in Appendix A, which we think could easily be adapted to apply to any type of mortgage. Such a deed would specify only:-

(a) the date of the mortgage

(b) the names and addresses of the parties to the mortgage

(c) the description of the mortgaged property (including Title Number if title is registered, and the nature of the interest mortgaged)

(d) a charging clause, in very general terms, such as: "The mortgagor [as beneficial owner] mortgages the property as security for the payment and discharge of all monies and liabilities due for the time being from the mortgagor to the mortgagee under the terms of this mortgage"

(e) any further registration requirements, for example whether the mortgage is a continuing security and secures further advances

(f) reference to collateral documents which are intended to be incorporated in the mortgage.

An alternative approach, as the Conveyancing Committee pointed out,[38] would be to have the same form comprising a standard front page to all mortgage deeds.[39] This makes it possible to ensure that all the terms of the mortgage transaction are recorded in a single document. There are advantages and disadvantages in this, and we return to the point later (paragraph 5.44).

5.33 Such a form obviously does not contain all the terms agreed by the parties. In particular, we believe it should not contain details of the loan agreement made between the parties: we envisage that all financial terms would be contained in a collateral document incorporated by reference (or, if the standard front page approach is adopted, in the body of the deed). The charging clause would then simply charge the mortgaged property with the payment and discharge of all money and liability due to the mortgagee under the mortgage. The problem with including financial terms in a standard form is the considerable variation in the terms imposed in different types of transaction and by different types of lender. It may be possible to identify the many different types of lending transaction currently used or likely to be used in the foreseeable future and produce standard forms

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38 Second Report of the Conveyancing Committee, 1985 para 9.32.

39 In which case, the details we refer to in (f) would of course be omitted, since it would not be necessary for there to be any collateral documents.

appropriate to each type.[40] However, it seems important to us that the financial terms contained in mortgage documents should accurately reflect the lending transaction to which they relate. If atypical transactions have to be made to fit into one of a limited number of pre-existing types, then distortion will inevitably result. Moreover, it may have the undesirable side-effect of stifling innovation in lending markets. For these reasons we think it is preferable to keep financial terms out of any prescribed standard form, but we shall be interested to know whether anyone envisages that this could cause problems that we have not anticipated.

5.34 Standardising the content of mortgage deeds

The sort of standard form we have discussed so far represents only a very modest step towards standardisation. We believe that further steps are feasible. The first possibility is to increase the range of terms implied by statute into mortgage deeds. We are thinking in particular here of terms to be implied in all mortgages but capable of exclusion or variation by express provision in the mortgage deed: if the rights, duties and powers of the parties can be more fully set out by statute in terms that lenders are

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40 This is done in Scotland, where the standard security introduced by The Conveyancing and Feudal Reform (Scotland) Act 1970 uses a primary distinction between transactions for "fixed" amounts and transactions for "fluctuating" amounts (sections 10 (1) (a) and (b)). See Halliday op. cit., paras 7-12 to 7-20 for an explanation of the intended uses of the different forms, and how they are used in practice.

prepared to accept without substantial variation, mortgage deeds can be made shorter and/or more uniform.[41] We see some scope for increasing the range of implied terms and we put forward our proposals for doing so in paragraphs 5.36-5.43. The second possibility is to introduce a greater uniformity into mortgagor protection provisions. There are, of course, other reasons why greater uniformity is desirable, but increased standardisation would be a side benefit of adopting a simplification along the lines of the mortgagor protection provisions we propose in paragraphs 9.15 - 9.37

5.35 An obvious way of dealing with the standardised terms we refer to in the preceding paragraph is to incorporate them into a set of Standard Conditions to be implied in all Formal Land Mortgages. This is essentially what was done in Scotland: the Conveyancing and Feudal Reform (Scotland) Act 1970 Schedule 3 sets out Standard Conditions which apply to all standard securities. Schedule 3 is reproduced in Appendix B to this paper. In this country, Standard Conditions could include not only the implied terms referred to in paragraph 5.34 but also the inherent rights discussed at paragraphs 5.21-5.27. It may also be convenient for them to incorporate some or all of the mortgagor protection provisions mentioned in paragraph 5.34, since many of these will consist of restrictions on the exercise of the mortgagee's rights

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41 Depending on whether there is a statutory requirement that the standard terms should be reproduced in the mortgage deed: see para. 5.44 below.

and remedies. As in the Scottish system, the parties would be free to exclude or vary some but not all of the Standard Conditions; we return to this point at paragraphs 9.2-9.6 below.

5.36 Standard Conditions We believe that progress towards more generally acceptable implied terms can be made in three main areas. In the course of our research we analysed standard mortgage deeds used by 30 lending institutions.[42] Unsurprisingly, we found major differences between the various deeds, reflecting the different purposes for which they are used. However, in some important areas unity of substance was obscured only by variations in presentation. First, we found that most of the deeds contained extensive (and, we would have thought, relatively uncontroversial) obligations on the mortgagor to preserve the state and condition of the mortgaged property. We think it should be possible to produce statutory obligations covering this area that most borrowers and lenders would find acceptable. Secondly, these deeds almost invariably excluded or extensively varied the existing statutory provisions about insurance, leasing powers,

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42 These were the fifteen largest building societies in terms of asset size, eight clearing banks, two local authorities, three finance houses, the Agricultural Mortgage Corporation and the National Home Loans Corporation. In some cases, particularly among clearing banks, we saw different standard forms for use with different types of property. The Agricultural Mortgage Corporation uses a system of standard clauses rather than a standard deed.

and consolidation. Consideration should be given to whether these statutory provisions could be amended in such a way as to be more acceptable to more lenders. Thirdly, we found that statutory provisions relating to enforcement of the security were often excluded or varied, frequently in order to remove the unsatisfactory features we discussed in paragraphs 3.46-3.63. We think it should be possible to re-draft these statutory provisions in a simpler, clearer, and more acceptable form. We look at the sort of Standard Conditions that could be adopted in each of these three areas in the following paragraphs. We welcome comments on the acceptability of Standard Conditions along the lines of the ones we discuss. Also, we should be interested to hear of other topics thought to be appropriate for this sort of standardisation.

5.37 Preservation of the state and condition of the mortgaged property We suggest that Standard Conditions could be devised to cover the following points, all of which were commonly included in the mortgage deeds we looked at:-

(a) covenants by the mortgagor:

(i) to maintain and repair the mortgaged property.

(ii) to complete building operations on the mortgaged property.

(iii) not to demolish or make any structual alteration to buildings on the mortgaged property.

(iv) to perform and observe obligations affecting the mortgaged property.

(v) to perform and observe planning orders, notices, etcetera, affecting the mortgaged property.

(vi) covenants for title substantially in the terms of those contained in the Law of Property Act 1925 Schedule 2 Parts III and IV.[43]

(b) Mortgagee's ancillary powers - in practice a mortgagee needs powers to perform obligations which the mortgagor fails or omits to perform (otherwise he may be put in the invidious position of having to seek enforcement of the security for what may be a trivial breach). For this purpose we suggest that mortgagees be given implied powers to perform mortgagors' obligations. In order to give

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43 If our proposals for limiting the circumstances in which a mortgagee may take possession of the mortgaged property (para. 5.27(a) above and para. 9. below) are accepted, then it will be necessary to amend the implied covenants contained in the Law of Property Act 1925, Schedule 2 Part III. Moreover, in the case of mortgages of leaseholds there will be some overlap between the implied covenants contained in the Law of Property Act 1925, Schedule 2 Part IV and the mortgagor's covenant suggested at para. 5.37 (a) (iv) above. This may prove a useful opportunity to update the implied covenants contained in Parts III and IV of Schedule 2.

effect to these powers mortgagees will require further powers to enter the mortgaged property for the purposes of inspection and carrying out works, and to require production of documents affecting the mortgaged property (notices, receipts, permissions, etcetera).

5.38 Insurance In the mortgage deeds we looked at we did not find satisfactory provisions relating to insurance of leasehold property that were uniformly used by different types of lender. It may be that the problems are too diverse to be dealt with satisfactorily by Standard Condition, but we welcome the views of those involved in this area on this point. In relation to other property we do not think the same problems exist. We therefore propose that, except where the mortgaged property is a leasehold interest, there should be Statutory Conditions to the effect that a mortgagee may either (i) require the mortgagor to insure or procure the insurance of the mortgaged property and produce evidence of having done so (policy documents, receipts, etcetera); or (ii) insure the mortgaged property and recover the cost of doing so from the mortgagor. The second alternative should not be available if the mortgagor is bound to different insurance arrangements by a prior encumbrance. In either case the mortgagee should have discretion as to the method of insurance, including the amount of cover and the type of risk (unless this discretion is curtailed by the provisions of any prior encumbrance). The mortgagee should also be entitled to require insurance to be maintained in the joint names of mortgagor and mortgagee. In addition, the Statutory Conditions could include a covenant by the mortgagor to notify the mortgagee of any claim on insurance and to

refrain from any act or omission which would invalidate insurance cover.

5.39 Application of insurance proceeds We find it more difficult to put forward satisfactory uncontroversial Standard Conditions about the application of insurance proceeds. We believe that in practice the most common express provision in mortgage deeds is that the mortgagee may choose whether insurance proceeds are used for reinstatement or for paying off the mortgagor's indebtedness. We have already explained in paragraph 3.28 that there is uncertainty about the effect of such a provision, and that in any event it does not always produce a satisfactory result where other parties have an interest in the mortgaged property. For these reasons we hesitate to suggest that it should be embodied in a Standard Condition. Our tentative view is that the application of insurance proceeds is a problem that requires consideration in the wider context of insurance of buildings in multi-ownership, and that it would be unsatisfactory to deal with the position between mortgagor and mortgagee in isolation from this wider context. Until the problem is resolved, however, we suggest the matter should not be covered by a Standard Condition.

5.40 Leasing powers If the proposals we make in paragraphs 5.24 and 5.27(b) are adopted, no Standard Condition about the power to grant leases is strictly necessary, though it may be desirable for the avoidance of doubt to have one setting out the position we outline in paragraph 5.27(b). Subject to what we have

to say in paragraph 9.6(a), we anticipate that those mortgagees who wish to contract for a power to grant leases (exercisable by themselves or by a receiver appointed by them) will be able to do so by including in the mortgage deed a power of attorney whereby they can grant leases in the mortgagor's name.

5.41 Consolidation We consider in paragraph 9.41 whether the doctrine of consolidation should be retained, reformed or abolished. If it is to be retained (whether in its present form or reformed) we propose that it should be embodied in a Standard Condition. If it is to be abolished, we suggest that there should be a non-variable Standard Condition on the lines of the Law of Property Act 1925 s.93 (i) (excluding the proviso), viz:

> "A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem."

5.42 Enforcement In Part 9 we make proposals for fairly substantial amendments to the present system of enforcement of mortgages. Whether or not these amendments are made, we think it should be possible to produce acceptable Standard Conditions relating to matters such as:

(a) the remedies available,

(b) when they become exercisable, and

(c) how they are exercisable, in particular the powers and liabilities of a receiver, the duties of a mortgagee in possession and on sale, and the application of receipts and sale proceeds.

At present these matters are dealt with by provisions of the Law of Property Act 1925, and apply subject to any express provision to the contrary in the mortgage deed. We consider how far these Standard Conditions should be variable in Part 9.

5.43 Costs Since mortgage deeds commonly contain provisions entitling the mortgagee to recover all costs and expenditure from the mortgagor, it seems appropriate to have a Standard Condition to this effect. We propose that where a mortgagee incurs expenditure in the exercise of the rights, powers, and remedies we refer to in paragraphs 5.37, 5.38, and 5.42, then, in so far as that expenditure was reasonably incurred for the purpose of protecting or enforcing the security, it should be recoverable from the mortgagor. It may be appropriate to include a provision to the effect that such expenditure may carry interest and constitute a charge on the mortgaged property from the date of expenditure until the date of recovery.[44]

5.44 Documentation If the primary objective of standardisation is to make the creation and discharge of mortgages cheaper, quicker, and more efficient, then the best method is probably to have a short form of mortgage deed with the statutory Standard Conditions

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44 This may not be desirable where the mortgage secures a third party liability.

automatically implied and all other terms set out in ancillary documents incorporated into the mortgage deed by reference. If this system was adopted in this country, we assume that many lenders would produce their own standardised printed ancillary documents, which would include their standardised variations of the statutory Standard Conditions. This is essentially what now happens in Scotland. Such a system could be adopted now in this country without any change in the law, and we understand that some lenders are already moving towards it. We can see several advantages in such a system: it must make it quicker and easier for legal advisers and the Land Registry to ascertain the terms of the mortgage, the mortgage documentation presumably becomes cheaper to produce, and lenders require considerably less storage space for deeds. However, it suffers from the major disadvantage of making it more rather than less difficult for the mortgagor to find out and understand the terms of the mortgage without legal advice. This is more likely to cause problems with house mortgages than with mortgages of other property. In particular, a mortgagor who needed to find out about such continuing obligations as repair or insurance, or the likely consequences of any default, would have to find the relevant Act of Parliament and then try to work out what it meant when read together with possibly overlapping provisions contained in a printed booklet. We find this a strong argument for requiring a mortgage deed to be a comprehensive statement of all the terms of the mortgage, at least where the mortgage is of a dwelling house: this would mean imposing a requirement that the mortgage deed must set out the statutory Standard Conditions and any variations to them, preferably in such a way as to make clear the effect of the variation

on the relevant Standard Condition. It may be, however, that such a system involves sacrificing most of the practical benefits of standardisation, and we welcome comments on this point, particularly from those who are interested in promoting greater standardisation of mortgage deeds.

I. Other Matters

5.45 Consumer Credit Act 1974 form and content requirements Mortgages securing regulated agreements[45] must contain specified information, details of which are currently set out in the Consumer Credit (Agreements) Regulations 1983.[46] Broadly, such mortgages must contain[47] (i) specified information about the loan transaction, (ii) statements in a prescribed form about the protection and remedies available to the debtor under the Act, and (iii) prescribed form headings and signature boxes. In addition there are provisions designed to ensure that the documents are legible and that the prescribed information is given due prominence. If, as we propose in paragraph 9.3, the Consumer Credit Act 1974 ceases to apply to mortgages of interests in land, it may be desirable to re-enact some of these form and content requirements to apply to the protected class of mortgage we discuss in paragraph 9.2. If so, we hope it would be possible to do so in a considerably simplified form.

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45 See para. 3.41 above, in particular footnote 127.

46 S.I. No. 1983 No. 1553.

47 Strictly, it is the regulated agreement which is secured by the mortgage that must contain the prescribed information: Consumer Credit Act 1974 section 60.

5.46 Formal Land Mortgages of agricultural land. We believe that the proposals we make in this Part are appropriate for dealing with mortgages of interests in agricultural land, apart from the provisions about leasing powers. Since 1948, a mortgagee of agricultural land is not entitled to exclude the leasing powers conferred on a mortgagor in possession by the Law of Property Act 1925 section 99.[48] As far as we know, this is generally regarded as satisfactory, and we suggest the position remains unaltered, i.e. that Formal Land Mortgagors of agricultural land should have the same leasing powers as those at present enjoyed by mortgagors of agricultural land. There may be other problems peculiar to agricultural mortgages that we have overlooked. If so, we hope that those involved in this area will draw them to our attention.

5.47 Inter-relation with non-consensual charges As far as we know, the proposals we make in this Part are compatible with the present law regulating the protection and enforcement of non-consensual charges. Again, however, we hope consultees will point out any problems we have overlooked.

5.48 Transitional provisions If the new system we propose in this Part is adopted, mortgages created after the Act introducing the system came into force

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48 Agricultural Holdings Act 1986 s. 100 and Sch. 14 paras. 12(1) and 12(2).

would of course take effect as either Formal or Informal Land Mortgages as appropriate, and would be registrable/protectable as such. The more difficult question is how to deal with already existing mortgages. One possibility is for the old law to continue to apply to them. This has the advantage of preserving all existing rights and not interfering with what may have been carefully arranged commercial transactions. On the other hand it would make the law even more complicated than it is now, because the old and the new system would run concurrently for an indefinite period. The alternative is to have a fixed period, during which provision would be made for voluntary conversion of existing mortgages. The length of the period would need consideration: anything from 1/2 years to 10 years to 25 years could be appropriate, depending on whether the primary objective of the period is to give time for mortgagees to comply with registration requirements or to last for the average, or for the expected maximum, life of a mortgage. One reason for keeping the period as short as possible is that during it there would be three systems in operation simultaneously: the old law, the new law, and a hybrid which would apply to the voluntarily converted existing mortgages. On the other hand, the period must be long enough to ensure that a sufficient number of mortgages are either converted voluntarily or discharged, in order to avoid problems of mass registration of existing mortgages.

5.49 On balance, our provisional view is that the voluntary conversion period could be kept short, possibly even as short as one year. During that time the following steps would have to be taken:-

(a) In unregistered land, all mortgages made by deed and already registered as Class C(i) or Class C (iii) land charges would automatically on the day the Act came into force become Formal Land Mortgages. No further action would need to be taken except that those registered under Class C(iii) would have to be re-classified as Class C(i). All mortgages not made by deed and already registered as Class C(iii) land charges would automatically become Informal Land Mortgages on the date the Act came into force. No action would need to be taken about them. Other mortgages not made by deed would immediately become Informal Land Mortgages but would be required to register as Class C(iii) land charges by the end of the conversion period. Those that do register by that time will retain their pre-Act priority date and arrangements will have to be made for this date to be recorded as part of the land charge entry. Those that register after the end of the conversion period will take priority from their date of registration. The biggest problem would arise with mortgages made by deed but not already registered as land charges. This must include nearly all first legal mortgages: we do not know how many of these there will be by the time the Act comes into force, but we suspect it could be a very large number. At

present there are probably over one million mortgages in this category[49] but presumably the number will decrease annually as registration of title at the Land Registry increases. All these would automatically become Formal Land Mortgages on the date the Act came into force. The problem would be in making arrangements for them to be registered as Class C(i) land charges within the voluntary conversion period: in fact what we suggest is that the length of the conversion period should be dictated largely by how long it is anticipated that this task would take. All those that do register within this period should retain their pre-Act priority

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49 We estimated earlier that there are between 7.5 and 8 million dwellings in England and Wales which are subject to at least one mortgage (Part 1, n.5). It is also estimated that over 87% of the population of England and Wales live in areas of compulsory registration (see Registration of Title Orders 1984 and 1985 S.1.No. 1984/1693 and No.1 1985/1999 and Chief Land Registrar's Report to the Lord Chancellor on H.M. Land Registry for the year 1984-1985 (1985) p.7). Clearly, the fact that an area is designated as a compulsory registration area does not mean that all land in that area is yet registered. Extrapolating from these estimates it seems clear that there must be at least 1 million first mortgages affecting unregistered land (although it is impossible to account fully for regional variations). Again, these figures are based upon dwellings: the number of first mortgages affecting unregistered land may be far higher when commercial property is taken into account.

date, and again this would have to be recorded in the land charge entry.[50] Those that register afterwards would take priority from their date of registration.

(b) In registered land, all substantively registered mortgages would automatically be converted into Formal Land Mortgages on the date the Act came into force, and no further action would be required in respect of them. All other mortgages would be Informal Land Mortgages. Those made by deed would be entitled to become Formal Land Mortgages by applying for substantive registration. Those that remained as Informal Land Mortgages would become protectable on the register by the appropriate means: in most cases this would involve no change in the existing method of protection. Since most mortgages are already registered or protected on the register, we assume that there would not be the same problem about resources as there would be in unregistered land nor should there be the same need to back-date priorities. There would, however, still be cases where changes in procedure might be necessary to preserve existing priority.

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50 Strictly, this would only be necessary where there were competing encumbrances. In practice, it may be simpler to give them all priority as from their date of creation, with a procedure for appeal in cases where this upsets established priorities. We suspect that such cases would be rare.

5.50 Standardisation requirements could not of course be made to apply to existing mortgages, but we do not see that this need cause any problems. The conversion of all existing mortgages would involve some alteration in the rights and remedies of mortgagees. However, we do not think this would materially disadvantage mortgagees in most cases: on the whole, the alterations we suggest in this proposal either remove rights rarely exercised in practice or are subject to variation by contrary provisions in the mortgage deed.

5.51 Conclusion The preceding paragraphs are intended to demonstrate that it is feasible to devise and introduce a simplified and rationalised system of mortgaging interests in land based on a new, uniformly applicable form of mortgage. We have gone into such matters as form and registration in some detail in order to show how such a system could operate, but of course none of this detail is immutable. We would therefore like to have comments and criticisms both on the general principle of this proposal, and on the more detailed suggestions we have made on the working of the new system.

PART 6: PROPOSAL II

6.1. Our provisional view is that it is not only possible but desirable that the Formal Land Mortgage and Informal Land Mortgage should be used to mortgage all interests in land, not just legal estates and interests. It may well be necessary to treat mortgages of equitable interests differently from mortgages of legal estates for the purposes of protecting them against third parties (and consequently for priority purposes) and we make proposals for doing so as part of our main proposal in Part 5. As we explained in paragraph 3.19 the fact that personal property and equitable interests in land can be mortgaged together makes it necessary to ensure that mortgages of personal property and mortgages of equitable interests in land are subject to complementary protection procedures and priority rules. Nevertheless we do not consider that any of these problems makes it necessary to use different types of mortgage for equitable interests and legal estates in land. However, if this conclusion is not accepted and it is thought preferable to confine the use of the Formal Land Mortgage and the Informal Land Mortgage to legal estates and interests in land, then it will be necessary to decide what to do about mortgages and charges of equitable interests. We can suggest three possible solutions, which we set out in the following paragraphs.

6.2. Retention of both mortgage by assignment and equitable charge An obvious answer is to leave the present system substantially unchanged. A similar system applies to personal property, and it seems unlikely that it will change in the foreseeable future: the Crowther Report stressed the importance of concentrating not on the method by which a security interest in property other than land is created, but on the establishment of a uniform system of priority and enforcement for all types of security.[1] It would therefore be consistent with the personal property approach to security to retain the present methods of mortgaging/charging equitable interests but to make it clear that an equitable chargee has the same rights and remedies as an equitable mortgagee.[2] As we explained in the preceding paragraph, we are not convinced that there is any merit in maintaining such consistency (apart from in the areas of protection and priority), but we shall be interested to hear whether those involved in mortgaging equitable interests take a different view (see paragraphs 3.5 and 3.19 above).

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1 Report of the Committee on Consumer Credit (1971) Cmnd. 4596. Professor Diamond discusses the points in section 4.4 of his Consultation Document on Security over Property other than Land (1986). The Halliday Working Party set up by the Scottish Law Commission favours a different approach: see Report by Working Party on Security over Moveable Property (1986).

2 We can envisage no particular difficulty over this, if the remedy of foreclosure is abolished, as we propose in Part 9 below.

6.3. Abolition of mortgage by assignment If we are prepared to treat equitable interests in land differently from personal property interests, a logical simplification would be to abolish the mortgage by assignment and to provide that the only method of mortgaging /charging an equitable interest would be by the creation of an equitable charge. Our tentative view is that this is the best of the three solutions we put forward in this section; we cannot see that anything useful would be lost if it was no longer possible to mortgage equitable interests by assigning them to the mortgagee,[3] provided that an adequate system of protection and priority of equitable charges was established. We return to this point in paragaraph 6.5.

6.4. Abolition of consensual equitable charges Alternatively, the proposal we make in paragraph 6.3 could be reversed i.e. the mortgage by assignment could be made the only available method of charging an equitable interest consensually. It would then be possible to reserve the equitable charge for use as a non-consensual security device. In theory, it clarifies the law if a distinction can be drawn between an equitable mortgage and an equitable charge. In practice, however, we are not sure whether this distinction would be a desirable one: it would be unfortunate if it led to a divergence in the rights and

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3 If the mortgage by assignment was abolished, any subsequent attempt to create a mortgage by assignment would take effect as an equitable charge.

remedies of creditors whose security was created consensually and those whose security arose non-consensually.

6.5. Protection and priority Whichever of these three solutions was adopted, it would still be possible to adopt the proposals we make in Part 5 for the protection and priority of mortgages of equitable interests. In other words, whether equitable interests are to be mortgaged by Formal Land Mortgage, equitable mortgage by assignment, or equitable charge, we propose that the mortgage/charge should be:

(a) registrable as a Class C(iii) land charge in unregistered land and

(b) protectable by restriction (if the equitable interest arises under a trust) or notice (if it is a commercial equitable interest) in registered land.[4]

We do not have any alternative proposal for altering the rules governing protection and priority of mortgages of equitable interests. In particular, we feel that pending the outcome of Professor Diamond's review of security over property other than land the rule in Dearle v. Hall[5] should either cease to apply to mortgages or continue to apply in its present form. Any alteration to the rule to remove the unsatisfactory

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4 cf Part C of our forthcoming Third Report on Land Registration.

5 (1828) 3 Russ. 1. See para. 3.18 above.

features we referred to in paragraph 3.20 above might not necessarily be appropriate for the other dealings with equitable interests which are also covered by the rule; on the other hand, to confine any alteration in the rule to mortgages would increase rather than decrease the complexity of this area of the law.

PART 7: PROPOSAL III

7.1. Some of the simplifications we suggest in Part 5 could be achieved without introducing a new sui generis form of mortgage. Structural simplifications could be made by abolishing some of the existing forms of and methods of creating mortgages, and then making adaptations to the remainder, rather than by creating new forms. As a result, all the present law would continue to apply except in so far as it was specifically changed. Thus, much of the present substratum of the law (necessarily also much of the complexity) would be retained.

7.2. Legal mortgage If the present structure is to be simplified, the obvious place to start is with the abolition of the obsolescent mortgage by demise.[1] If it was abolished, then there would be only one form of legal mortgage of an interest in land, i.e. the charge by way of legal mortgage. The question that then arises is how should the charge by way of legal mortgage be defined. As presently defined by section 87(1)(a) of the Law of Property Act 1925, the mortgagee has "the same protection, powers and remedies ... as if ... a mortgage term for three thousand years without

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1 We do not know how many subsisting mortgages by demise there are, but we believe that few (if any) have been created in the last few years.

impeachment of waste had been created in [his] favour."[2] The abolition of the mortgage by demise would make this already rather obscure definition even more abstruse. Whilst it is technically possible to provide that a mortgagee is to be treated as if he had a mortgage of a type that can no longer exist, it would make the law clearer and more easily understood if a different definition could be produced. However, we find it difficult to suggest a satisfactory alternative. We explained in pararaph 3.4 the objections to defining a mortgage by reference to a lease; we cannot think of any other legal concept which would provide a more appropriate analogy. The only other possibility is to define the charge by way of legal mortgage de novo, but if such a change is necessary, it would almost certainly be simpler to start again with a new form of mortgage, as we propose in Part 5. On balance, therefore, we feel that if the charge by way of legal mortgage is to survive, its definition should remain substantially unaltered.

7.3. We explained in paragraph 3.4 that the quasi-leasehold mortgage relationship led to an inappropriate distribution of inherent rights of possession, of power to grant leases and other derivative interests, and of repair and insurance rights and obligations. At present, these rights, powers and duties are redistributed by a combination of equitable principles and statutory provisions. This complicated structure

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2 Or, if the mortgaged property is a lease, as if a sub-lease of a term one day shorter than the mortgagor's term had been created in the mortgagee's favour: s. 87(1)(b) Law of Property Act 1925.

could be simplified by providing by statute that, notwithstanding the quasi-leasehold interest of a mortgagee under a charge by way of legal mortgage, the rights, powers and duties of the parties in relation to possession, the grant of leases and other derivative interests, and repair and insurances should be the same as those we propose in Part 5 for a Formal Land Mortgage. This point would be reinforced by adopting the proposal we make in paragraph 9.15, i.e. by providing by statute that a mortgagee's rights in the mortgaged property (including, but not confined to, remedies exercisable on default) are exercisable only in good faith for the purpose of protecting or enforcing the security.

7.4. The proposals we make in Section 5 in relation to standard forms and Standard Conditions for Formal Land Mortgages could apply equally to the charge by way of legal mortgage.

7.5. Equitable mortgages of a legal estate

Assuming that we wish to retain the equitable mortgage or charge as an informal method of mortgaging legal estates, we can suggest two ways of modernising the existing system. The first is to move the boundary between the charge by way of legal mortgage and the equitable mortgage so that it more closely marks the difference between formal and informal mortgage. This could be done by providing that:

(a) any purported mortgage or charge of a legal estate in land if made by deed will take effect as a charge by way of legal mortgage

(i.e. what would now be an equitable mortgage would, if made by deed, be treated as a legal mortgage[3]) and

(b) all other purported mortgages and charges of a legal estate, and all specifically enforceable agreements to create a mortgage or charge of a legal estate, will take effect as equitable mortgages if made in writing.[4] This would entail the abolition of the consensual equitable charge, in that a purported equitable charge would take effect as an equitable mortgage.[5]

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3 C.f. the proposals we make in our forthcoming Third Report on Land Registration, that equitable mortgages made by deed should be substantively registrable.

4 As we explained in paragraph 5.4, we do not think it should be possible to create a security interest in land consensually without writing.

5 A possible alternative would be to reverse the position and abolish the equitable mortgage, by providing that all purported mortgages and charges of a legal estate (other than those made by deed) and contracts to create a mortgage etc, take effect as equitable charges. The advantage of doing so, as we explained in paragraph 6.4, is that it avoids the possibility of a distinction developing between consensual and non-consensual security interests: the latter are charges rather than mortgages.

Our alternative proposal for rationalisation is more modest. It is to assimilate equitable mortgages and charges, by providing that they all take effect as equitable mortgages, or that they all take effect as equitable charges.[6]

7.6. Mortgages and charges of equitable interests The charge by way of legal mortgage clearly cannot be used for mortgaging equitable interests in land. The proposals we make in Part 6 for dealing with equitable interests are compatible with the proposals we make in this Part for mortgaging legal estates, and so could be adopted even if our proposals for the introduction of a Formal Land Mortgage and an Informal Land Mortgage are not implemented.

7.7. Registration, protection and priority of mortgages of legal estates The proposals we make in Part 5 for the registration, protection and priority of Formal Land Mortgages and Informal Land Mortgages could be adopted to apply to charges by way of legal mortgage and to equitable mortgages/charges of a legal estate. If however the present system is retained whereby mortgagees can (and in the case of unregistered land must) rely for protection on possession of title deeds rather than on registration, then we suggest that priority rules should be simplified in the ways we put forward in Part 8.

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6 For the reason given in note 5 above, we think the latter is on balance preferable.

PART 8: PROPOSAL IV

8.1. Even if no change is made in the present structure of mortgage law, so that it remains in the form we summarised in the Table at the end of paragraph 3.2, it may still be desirable to implement some of the proposals we make in Part 5, and to make some other relatively minor simplifications.

8.2. Registration The most significant change would be to increase the scope of registration, so that mortgagees ceased to be required or entitled to rely for protection solely on taking a deposit of title deeds. This would dispose of most of the priority problems we discussed in paragraphs 3.13 - 3.17 and make it easier to remove some unsatisfactory features of the doctrine of tacking of further advances (paragraph 3.21). The registration rules we suggested in Part 5 for Formal and Informal Land Mortgages could be adapted to apply to the existing system by providing:-

(a) In unregistered land, mortgages protected by deposit of title deeds should become registrable as land charges under the Land Charges Act 1972. As a result, all legal mortgages (i.e. mortgages by demise and charges by way of legal mortages) would be registrable as Class C(i) land charges, and all equitable mortgages/charges of a legal estate would be registrable as Class C(iii) land charges.

(b) In registered land, in accordance with the recommendations we make in our forthcoming Third Report on Land Registration, all mortgages of a legal estate made by deed (whether legal or equitable) would be substantively registrable, and all other mortgages of a legal estate would be protectable by notice or caution. It would no longer be possible to protect a mortgage by giving notice of deposit of the land certificate.

8.3. Priority rules for unregistrable mortgages

If the registration proposals we put forward in paragraph 8.2(a) above are delayed or prevented for any reason,[1] it should still be possible to simplify and modernise the priority rules governing mortgages not covered by the Land Charges Act 1972. One of the major complicating factors in the present system is the rule that, prima facie (and subject to the important qualification that it applies only "where the equities are equal"[2]) a legal mortgage takes priority over an equitable mortgage. We do not think it accords with modern expectations to give such significance in a priority dispute to whether the mortgages are legal or equitable, and we suggest that this rule should be

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1 We explain the transitional difficulties in relation to unregistered land in para. 5.49. The problem does not arise in registered land to the same extent, since all mortgages of a legal estate already require either registration or some form of protection on the register.

2 See paras. 3.14-3.16.

abolished. The basic rule would then be that (subject to the provisions of the Land Charges Act 1972) mortgages take priority according to their date of creation; the only remaining question is then what circumstances upset this prima facie order of priority. This can be dealt with in two ways: one can look either at the conduct of the subsequent mortgagee, or at that of the prior mortgagee. Expressed in terms of the conduct of the subsequent mortgagee, the rule we would suggest is that a subsequent mortgagee acting bona fide takes priority over an earlier mortgagee of which he had no actual, constructive or imputed notice.[3] An objection we can see to expressing the rule in this way is that it does not clearly deal with the unsatisfactory cases about conduct in relation to title deeds that we referred to in paragraph 3.16. For this reason we think it would be better to express the rule in terms of the prior mortgagee's conduct, for example by providing that a mortgagee only loses priority over a subsequently created mortgage by fraud, estoppel or any conduct in relation to the title deeds which contributes towards the later mortgagee believing he will have priority.[4] In theory, this imposes a much higher standard of care of title deeds on a mortgagee relying on them for protection than is justified by the case law. However, as we explained in paragraph 3.17, we think such a standard accords with modern expectations, and we would not expect that the

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3 For what constitutes notice in this context see Snell's Principles of Equity (1982) 28th ed. pp. 51-57.

4 Including a belief that there was no earlier mortgage.

introduction of such a rule would cause any mortgagee to review the arrangements presently made for taking care of title deeds.

8.4. Protection and priority of equitable mortgages and charges of equitable interests For the reasons we gave in paragraph 6.5, we do not suggest any change in the rules other than that these mortgages/charges should all be registrable as Class C(iii) land charges in unregistered land, and protectable by restriction or notice or caution in registered land.

8.5. Standard Forms and Standard Conditions Standardisation, whether by means of prescribing standard forms for mortgages, or by increasing and updating the range of standard terms to be implied by statute into mortgages, is primarily desirable for routine transactions such as residential and some commercial mortgages. The type of mortgage used in such transactions is likely to be (probably invariably is) the charge by way of legal mortgage. There would therefore be considerable benefits in applying some or all of the proposals we make in Part 5 about standardisation to the charge by way of legal mortgage, even if no other changes are made.

PART 9: PROPOSAL V

9.1. We believe that the greatest contribution towards simplifying the law of land mortgages will be made by reforming its structure, as we propose in Parts 5-7. However, whether or not any structural reform is made, we think it would be valuable to deal with the more detailed problems we discussed in paragraphs 3.21-3.78. We set out our proposals for doing so in this section.

A. A protected class of mortgage

9.2. A number of the mortgagor protection provisions we discuss in the following paragraphs may be thought necessary or desirable for some classes of mortgage but not for others. At present, there are differently defined classes of mortgage affected by various different statutory protection provisions (see for examples paragraphs 3.38-3.43 and 3.66-3.70). It would be a useful simplification of the law if these different classes could be combined to form a single protected class of mortgage. It would then be easier to produce a simplified list of mortgagor protection provisions, some of which would apply to all mortgages, and the rest of which would apply only to the protected class. We welcome comments on which mortgages should be included in such a class: we put forward for consideration here four different options and we invite comments on these options and welcome any alternative suggestions:-

Option 1 is that the class should comprise all mortgages where:

A. the mortgagor is an individual, and

B. either (i) the loan originally secured does not exceed £15,000 (this amount to be calculated, and subject to variation, in the same way as the monetary limit for a consumer credit agreement specified in the Consumer Credit Act 1974 section 8)

or (ii) the mortgaged property is or includes premises occupied as a residence by the mortgagor or the mortgagor's family.

The objective is to include all mortgages at present subject to the main body of the protection provisions of the Consumer Credit Act 1974,[1] plus any mortgage of the mortgagor's residence. In order to keep the definition simple, and in particular to avoid the considerable difficulties we explain in paragraph 3.41, this class includes some mortgages that are not at present protected under the Consumer Credit Act 1974 and are not of the mortgagor's residence. The only mortgages that fall within this category will be those "exempt agreements" (as defined in the Consumer Credit Act 1974) that are not secured on the mortgagor's residence. We suspect that most exempt agreements are

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1 We explain which mortgages this covers at para. 3.41 and note 127 thereto.

in fact secured on the mortgagor's residence,[2] and that therefore the mortgages that would be brought within this protected class purely for the purpose of simplifying the law are few in number. However, it is clearly important to find out whether this is correct, and what sort of difficulties it would cause to include these mortgages within the protected class. We welcome all information and comments on this point.

Option 2 is that the class should be the same as that put forward as Option 1, except that B(ii) should be widened, so that a mortgage would be in the protected class if the result of a possession order obtained by the mortgagee would be to dispossess any person of their residence. It would be justifiable to widen the class in this way if it was thought desirable to protect all mortgages where residential property is used as security, even if occupied by a tenant or licensee of an individual mortgagor rather than by the mortgagor and/or his family.

Option 3 is to widen the residential class still further by making B(ii) encompass all mortgages where the mortgaged property is or includes a dwelling house (i.e. the class at present covered by the protection against enforcement provisions of the Administration of Justice Act 1970 section 36[3]). This would have the advantage of simplicity, but it would mean including in

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2 Exempt agreements are defined in section 16 of the Consumer Credit Act 1974 and in the large body of subordinate legislation we list in note 126 to para. 3.41 above. We give a (relatively) brief explanation of which mortgages come within the exempt agreement category in note 127 to para. 3.41 above.

3 See para. 3.69.

the protected class mortgages of property such as reversionary interests in blocks of flats held by individual(s).

Option 4 is to have two classes of protection. Provisions regulating the form and content of mortgages could be made to apply only to a relatively narrow class, whereas those regulating enforcement could apply to a wider class. The narrow class could perhaps be that described in Option 1, or, possibly even more narrowly A + B(i) of Option 1 (i.e. the simplified Consumer Credit class). The wider class could be that described in Option 3.

9.3. The major advantage of including in the protected class all mortgages at present covered by the Consumer Credit Act 1974 is that it then becomes possible to remove mortgages of land from the Consumer Credit Act 1974 completely. In the following paragraphs we propose that the existing Consumer Credit Act mortgagor protection provisions should be substantially re-enacted to apply to all mortgages in the protected class.[4] Provided that this can be done, we suggest that it is both desirable and workable to amend the Consumer Credit Act 1974 so that it no longer applies to agreements secured by mortgages of interests in land.

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4 Or, if option 4 is preferred, all mortgages in the narrower protected class.

9.4. In the rest of this Part we refer to mortgages within the protected class as "protected mortgages."

B. Restrictions on mortgage terms

9.5. We explained in paragraphs 3.30-3.45 the complex of different rules at present restricting the freedom of mortgagor and mortgagee to select whatever mortgage terms they choose. It is worth considering whether these rules can be rationalised. As far as we can see, there are two justifications for restricting freedom of contract in relation to mortgages. The first is to preserve the essential nature of a mortgage transaction: if the parties want to give a lender rights in the borrower's property which are substantially greater than or different from those necessary to make the property available as security for the loan, then a mortgage is not an appropriate legal mechanism for them to use. The second justification is to protect mortgagors from exploitation by mortgagees, recognising that in many cases mortgagors have no choice but to accept the terms laid down by mortgagees. With these two justifications in mind, we put forward for consideration three categories into which rationalised restrictions on freedom of contract might be put: (i) non-excludable statutory provisions (paragraph 9.6) (ii) restrictions on financial terms (paragraphs 9.7-9.12) and (iii) reformulation of the court's jurisdiction to strike out or vary mortgage terms (paragraphs 9.13 and 9.14).

9.6. Non-excludable statutory provisions In both the existing law and the law as it would be if our proposals were accepted, statutory provisions govern the inherent rights of the parties and many other aspects of their relationship. How far should these be excludable or variable by express or implied terms in the mortgage deed? In our Report on Obligations of Landlords and Tenants[5] we recommended that covenants implied by statute into all tenancies should be classified as either overriding (i.e. implied regardless of any provision in the contract of tenancy) or variable (i.e. could be excluded or modified by

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5 Codification of the law of Landlord and Tenant: Report on Obligations of Landlords and Tenants (1975) Law Com. No. 67.

express terms of the tenancy).[6] A similar classification could be adopted in relation to mortgages. If it were, we suggest the following provisions as possible candidates for classification as overriding:-

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6 Ibid. paras. 28 and 29. In the Draft Landlord and Tenant (Implied Covenants) Bill printed as Appendix 1 to the Report, overriding and variable covenants are defined in Clauses 2 and 3 respectively:

Overriding covenants.

2. A covenant directed by this Act to be implied as an overriding covenant has effect notwithstanding any provision of the contract of tenancy; and any term of that contract is void in so far as it purports-

(a) to exclude or limit the obligation of the landlord or tenant, as the case may be, under the covenant (whether expressly or by imposing a more limited obligation on the same party or an obligation on the other party or otherwise by implication); or

(b) to authorise any forfeiture or impose on the tenant or landlord any penalty or disability in the event of his enforcing or relying on the covenant, or any obligation to reimburse the cost of complying with it.

Variable covenants.

3. A covenant directed by this Act to be implied as a variable covenant may be excluded or modified by express provision in the contract of tenancy, or by necessary implication from any such express provision (including in particular any express covenant by either party relating to the same subject-matter).

(a) statutory leasing powers. At present, mortgagees can, and frequently do, give themselves complete control over the grant of leases and other derivative interests, either by excluding the mortgagor's statutory powers or by making them excercisable only with the mortgagee's consent. They may well want to do the same if the parties were given, by statute, the rather different leasing powers we propose in paragraphs 5.24 and 5.27(b). As a general principle, we would say that a mortgagee's only legitimate interest in relation to leases is to prevent the mortgagor creating encumbrances over the property which would make it insufficient security for the total potential liabilities of the mortgagor. If it is possible for this interest to be safeguarded without giving mortgagees total control over leasing powers then it could be argued that this should be done, and that mortgagees should be required to accept the position. We have already invited comments on the leasing powers we propose should be given to Formal Land Mortgagors (paragraph 5.27(b)). Subject to what our consultees may say on this point, we believe that our proposals do give mortgagees sufficient protection, and that therefore they should be made applicable to all mortgages even if other parts of Proposal I are not implemented, and that they should not be excludable or variable. However, we recognise that this is a significant restriction of the parties' freedom of contract, and that careful consideration must be given to whether it is justifiable.

(b) powers of a receiver In paragraph 9.18 we invite comments on whether it is appropriate for a receiver appointed under a power contained in a fixed as opposed to a floating charge to have the very wide management powers we described in paragraph 3.48. If it is thought to be inappropriate, then the statutory powers of a receiver should be made overriding rather than variable.

(c) possession A right for the mortgagee to take possession in any circumstances other than those we propose in paragraph 5.21 is, we believe unwanted in the present law, and would be entirely inappropriate in the new Formal Land Mortgage. The statutory provisions about possession that we propose in paragraph 5.21 should therefore, we suggest, be made overriding terms.

(d) enforcement of the mortgage In paragraphs 9.15 and 9.32-9.37 we propose that there should be restrictions on the mortgagee's power to enforce the mortgage, in particular to ensure that remedies do not become exercisable until there is a genuine default or threat to the security, and that the court has discretion to delay or prevent enforcement of protected mortgages. Clearly, it would not be appropriate for such protective provisions to be variable.

(e) mortgagee's duty of care In paragraph 9.40 we propose that there should be a statutory formulation of the duty of a mortgagee and a receiver on realisation of the security. We think that much of the clarity and certainty to be

gained by having a statutory formulation would be sacrificed if it was then made variable.

9.7. Restrictions on financial terms In paragraph 5.33 we put forward the view that standardisation is not appropriate for financial terms, partly because they are not sufficiently uniform in practice, and partly also because of the danger of inhibiting what may be desirable innovations in lending practices. However, not all innovations are desirable from the mortgagor's point of view, and it may be advisable to have some statutory restriction on payment terms as a mortgagor protection measure. This would be in addition to the general protection provisions we refer to in paragraph 9.13. There are five areas in which restrictions may be appropriate; we consider these in paragraphs 9.8-9.12.

9.8 Regulation of variable interest rates We explained in paragraphs 3.44 and 3.45 that it is now common practice to include in mortgage deeds a right for the mortgagee to vary the rate of interest payable on the loan at any time. The mortgagor has little control over the mortgagee's discretion to vary this interest rate. If as a result of the variation (or failure to vary following a fall in market rates) the terms of the loan become either "unfair and unconscionable" or "extortionate"[7] the mortgagor can probably apply to the court for the rate to be lowered (although even this point is not free from doubt, as we

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7 See paras. 3.34 and 3.38 above.

explain in paragraph 3.44). However, this only entitles the court to intervene if either the mortgagee can be said to have acted "in a morally reprehensible manner"[8] or the rate charged exceeds the market rate by a very considerable amount.[9] In all other circumstances the mortgagor must rely on market forces to deter his mortgagee from allowing the interest rate to move far from market rates. In view of possible changes in the mortgage market (in particular those that might follow development of a secondary mortgage market in this country[10]) is it satisfactory to continue to rely on market forces, or should mortgagors be given some additional statutory protection? Whilst it may be justifiable to leave total discretion over the interest rate with a mortgagee chosen by the mortgagor, there are obvious objections to allowing a transferee of the mortgage to enjoy the same discretion if the mortgagor has no control over the identity of the transferee. However, there are a number of different ways of tackling this problem. One possibility is to give the mortgagor control over the identity of his mortgagee, by providing that his consent is required for any transfer of the mortgage.

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8 Browne-Wilkinson J. in Multiservice Bookbinding Ltd. v. Marden [1977] Ch. 84 at p.110; see para. 3.34 above.

9 In Davies v. Directloans Ltd. [1986] 1 WLR 823 Edward Nugee Q.C. sitting as a deputy HIgh Court judge said that the difference between 21.6% (the rate charged) and 18% (said to be the "proper" rate in the circumstances) was not "anywhere large enough" to be considered grossly exorbitant, and hence extortionate for the purposes of the Consumer Credit Act 1974. See para. 3.38 above.

10 See paras. 3.44, 3.45 and 3.76.

We consider this solution, and the reasons why it may not be wholly satisfactory, in paragraph 9.44. Another possibility is to restrict, or even remove, the discretion to vary the interest rate once the mortgage has been transferred by the original mortgagee. The difficulty with imposing tighter controls on transferees than those applicable to original mortgagees is that the controls can very easily be avoided by the original mortgagee passing control to the third party by means other than transfer of the mortgage. Again, we return to this point in paragraph 9.44. If neither of these possibilities is satisfactory the obvious alternative is to regulate the right of any mortgagee, whether original or a transferee, to vary the interest rate. We invite views on whether this is feasible or desirable in principle and, if it is, on how it can best be done. We put forward the following tentative suggestions for consideration:

(a) As a first step, it would be sensible to remove the doubts we expressed in paragraph 3.44 by making it clear that if a variation in interest rate or failure to vary does result in the mortgage becoming unfair and unconscionable, or extortionate (or within the general jurisdiction we discuss in paragraphs 9.13-9.14), the court does have jurisdiction to intervene, even though the variation is made pursuant to the terms of the mortgage.

(b) A further step might be to introduce a statutory maximum rate of interest. This was considered by the Crowther Committee in

1971[11] and rejected for reasons that, in our view, remain convincing. Apart from any economic or political reasons there may be for not putting a ceiling on interest rates, there are a number of other objections. The most important is that there is no objectively "proper" rate of interest: what is justifiable depends on the circumstances, in particular on the degree of risk and the size and duration of the loan.[12] Secondly, there is a danger that a statutory maximum rate becomes a standard rate.[13] Thirdly, a ceiling rate only usefully deals with rates that are considerably out of line, and arguably such rates are better tackled by a general formula such as that adopted by the Consumer Credit Act.

(c) A variation on the fixed maximum rate solution is to reintroduce the Moneylenders Acts system whereby a rate in excess of a statutory figure (under the Moneylenders Acts it was 48%) is prima facie void, with the onus on the lender to prove that the rate is not excessive. Although the Crowther Committee recommended that this system should be extended to all consumer credit transactions[14] their recommendation was not

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11 Report of the Committee on Consumer Credit 1971 Cmnd. 4596 paras. 6.61-6.69.

12 This is particularly apparent from the reported decisions on the Consumer Credit Act 1974 extortionate credit bargain provisons. See for example Ketley v. Scott [1981] ICR241; Castle Phillips Finance Co. Ltd. v. Khan [1980] CCLR 1; First National Securities v. Bertrand [1980] CCLR 5.

13 Cmnd. 4596 para. 6.6.7.

14 Ibid., para. 6.6.9.

implemented: our tentative view is that this method of controlling interest rates shares the defects of a statutory maximum rate, and is not an appopriate way of dealing with variable interest rates.

(d) A more promising approach might be to require all mortgagees to link variations in interest rate to some objective index. The mortgagee could be required to specify the index (and the extent to which the rate payable under the mortgage might vary from it) in the mortgage deed. Alternatively, it may be feasible to allow mortgagees to vary rates within a specified margin of any index from time to time approved by an official body for this purpose.

(e) Finally, a more general approach could be adopted: it could be provided that whilst originally agreed mortgage terms can only be challenged if unfair and unconscionable or extortionate (or under the general jurisdiction we discuss in paragraphs 9.13-9.14), a variation in interest rate (or failure to vary) must be reasonable. What is reasonable might perhaps be decided by reference to market rates currently available to a mortgagor in similar circumstances offering similar security.

A further point to consider is, if any such restriction is to be adopted, should it apply to all mortgages with variable interest rates or should it be restricted to protected mortgages? We welcome comments on this and on the other issues raised in this paragraph.

9.9 Extension of restrictions contained in the Consumer Credit Act 1974 sections 93-95 These provisions prohibit terms requiring the rate of interest to be increased on default, prohibit postponement of the right to redeem, and entitle the mortgagor to a rebate on premature repayment in appropriate cases. Should they be re-enacted to apply to all mortgages? Under the general law there is doubt about the validity of a provision requiring interest to be increased on default. Traditionally such a provision was considered to be void as a penalty,[15] but easily circumvented by reserving the higher rate as the rate normally payable and providing for its reduction in case of punctual payment.[16] More recently, the view has been expressed that a provision directly increasing interest on default would no longer be held void "provided it is kept within proper commercial bounds".[17] Our tentative view is that if provisions prohibiting increase in the rate of interest on default are to be invalidated in all mortgages, then so should provisions providing for decrease in the rate on punctual payment. If this is not acceptable, then we suggest that section 93 should cease to apply to any mortgage, and it should be made clear that any variation in the interest rate prompted by default or prompt payment should be challengeable under the general jurisdiction we discuss in paragraghs 9.13-9.14, but otherwise should be valid. We invite comments on which alternative is preferable.

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15 P.K.J. Thompson, Recovery of Interest: Practice and Procedure (1985) p. 14; for general principles concerning penalty clauses in contracts see Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd. [1915] AC 79.

16 Fisher & Lightwood p. 632. It is not clear whether the Consumer Credit Act 1974 s. 93 can be circumvented by such a provision.

17 J.R. Lingard, Bank Security Documents (1985) para. 7.42.

9.10 The right to a rebate on premature repayment provided by section 95 is only relevant to certain fixed instalment mortgages and it probably reflects the general law anyway.[18] For this reason we suggest it should be re-enacted to apply to all mortgages,[19] in order to clarify the law. However we welcome comments from anyone who can envisage that this would cause problems.

9.11 Postponement of the right to redeem Apart from section 94, postponements of the right to redeem are valid unless they make the right to redeem illusory, or are "oppressive or unconscionable"[20] when viewed in the commercial context in which the mortgage was made (see paragraph 3.32). In the light of the developments we refer to in paragraph 9.8 we suggest that consideration ought to be given to modifying this general principle so that a mortgagor is always entitled to redeem (a) on a transfer of the mortage by the mortgagee[21] and (b) if the interest rate payable is variable by the mortgagee in its absolute discretion. Our tentative view is that if this is done then it will not be necessary for section 94 to continue to apply to any mortgage, provided it is made clear that a postponement of the right to redeem may still be challenged under the general jurisdiction we discuss in paragraphs 9.13-9.14.

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18 Fisher & Lightwood p. 522.

19 Except where premature repayment is prohibited by a (valid) provision in the mortgage deed.

20 Knightsbridge Estates Trust Ltd. v. Byrne [1939] 1 Ch. 441 at pp. 456-7.

21 This will not help the mortgagor where the mortgagee passes control to a third party by other means (see para. 9.8 above) but nevertheless we think that entitling the mortgagor to redeem on an outright transfer does give some useful protection.

9.12 Interest in lieu of notice to redeem The final restriction on financial terms to be considered is allied to the right to redeem. Mortgagees often require mortgagors who wish to redeem to pay a lump sum representing several months' interest in lieu of notice to redeem. In many large commercial transactions it may well be the case that mortgagees need reasonable notice of the mortgagor's intention to redeem and we can see no reason why they should not require payment of interest in lieu of reasonable notice. In the case of protected mortgages, on the other hand, the state of the market is such that we wonder whether any notice of intention to redeem is really necessary and we put forward for consideration the suggestion that on redemption the mortgagee should be entitled to require the mortgagor to pay only its reasonable expenses for discharging the mortgage.

9.13 Re-formulation of the court's jurisdiction to strike out or vary mortgage terms We explained in paragraphs 3.30-3.39 the present jurisdiction of the court to strike out mortgage terms. It is worth considering what scope there is for rationalising the existing over-lapping jurisdictions. In theory it might be possible to formulate a single statutory jurisdiction to replace all existing grounds on which the court may set aside or vary mortgage terms. Our provisional view is that this is unrealistic, and probably undesirable anyway: at present there are many general law principles (for example, the doctrines of

restraint of trade[22] and undue influence,[23] and rules relating to penalties[24]) which can affect the validity of mortgage terms, and we can see little justification for excluding their application.[25] If these general law principles are to continue to apply, then the scope for rationalisation lies only in principles peculiar to mortgages (i.e. the equitable principles we discussed in paragraphs 3.31-3.36) and in the extortionate credit bargain provisions of the Consumer Credit Act 1974 (see paragraph 3.38). Would it be possible and desirable to replace the existing equitable mortgage jurisdiction with a single statutorily defined jurisdiction? One possibility would be to use the extortionate credit bargain provisions of the Consumer Credit Act 1974 for this purpose. In other words, the statutory jurisdiction would be defined in terms substantially similar to sections 137-139 of the Consumer Credit Act 1974 (which we reproduce as Appendix C to this Paper) with such alterations as may be necessary to make them

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22 See paragraph 3.37 above.

23 See in particular National Westminster Bank v. Morgan [1985] AC 686, Kingsnorth Trust Ltd. v. Bell [1986], 1 All ER 423, Avon Finance v. Bridger (1979) [1985] 2 All ER 281; Coldunell v. Gallon [1986] 1 All ER 429.

24 Snell's Principles of Equity 28th ed. (1982) pp. 527-530.

25 The advantage of doing so would be that it could reduce complication and duplication if all these principles were set out in one place. However, even apart from the difficulty of producing a satisfactory statutory formulation covering all these principles, once it had been done mortgages would be isolated from any future case law developments of these general law principles. This would be unfortunate in view of the material similarities between mortgages and the other transactions to which these principles apply.

applicable only to mortgages, and to all mortgages (not just those where the mortgagor is an individual).[26] This would produce a single relatively certain test for validity, and one of which the courts have already had some experience.[27] However, it would significantly narrow the court's existing jurisdiction. Terms that are unfair and unconscionable will not necessarily be held to be "grossly exorbitant" or to "otherwise grossly contravene ordinary principles of fair dealing".[28] More importantly, "extortionate" is arguably apt to cover only the terms of the loan, and may not extend to non-financial terms such as improper postponements of the right to redeem, or provisions entitling the mortgagee to acquire the mortgagor's interest.[29] Another objection to adopting the extortionate credit bargain test is that it was originally designed for the protection of consumer debtors: in devising a test appropriate for all

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26 In particular, the factors listed in the Consumer Credit Act 1974 s. 138(3) may need reconsideration if the debtor can be a company: c.f. Insolvency Act 1985 s. 103 and para. 3.39 above.

27 See e.g. Ketley v. Scott [1981] ICR 241, Wills v. Wood CA 22 March 1984 (unreported), Coldunell v. Gallon [1986] 1 All ER 429. It may or may not be significant that (in the cases of which we are aware), no mortgagor has yet succeeded in getting a credit bargain re-opened.

28 See para. 3.38 above.

29 See para. 3.32 and 3.33 above. Support for this argument comes from the Consumer Credit Act 1974 s. 139(2) which seems to restrict the court on re-opening a credit bargain to "relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable..." See C.A. Lonsdale, Extortionate Mortgages within the Consumer Credit Act 1974, unpublished LL.B. dissertation University of Southampton.

different types of mortgage it may be better to start afresh rather than to borrow from this rather specific field.

9.14 Another way of approaching the task of producing a new statutory jurisdiction for the courts to replace the existing equitable jurisdiction to strike out or vary mortgage terms, might be to produce a list of prima facie unacceptable terms, drawn from the existing equitable jurisdiction,[30] that would be invalid unless the mortgagee could satisfy the court that the term was reasonable in those particular circumstances. However, such an approach may lack the flexibility necessary to keep pace with economic and social developments in mortgage markets. We suggest the best approach would be to utilise the justifications for restricting freedom of contract that we put forward in paragraph 9.5. In other words, the court would have a discretion to alter or vary any term that (i) resulted in the mortgagee having rights in the property substantially greater than or different from those necessary to make the property available as security for the mortgagor's liabilities, or (ii) was either unfair and unconscionable in the sense we described in paragraph 3.34,[31] or extortionate in the

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30 For example, a postponement of the right to redeem, an option or other right for the mortgagee to purchase the mortgaged property or part of the mortgagor's interest, any advantage to the mortgagee in addition to repayment of the loan with interest at the market rate, and any advantage to the mortgagee continuing after redemption: see paras. 3.31-3.36 above.

31 i.e. imposed in a morally reprehensible manner.

sense we described in the previous paragraph.[32] Such a formulation of the court's jurisdiction would not be particularly simple, but we believe it would clarify the existing law without making any substantial alteration to it.

C. Enforcement of the mortgage - statement of general principle

9.15 We suggest that, as a basis for the rules regulating enforcement of the mortgage, there should be a general statutory statement to the effect that a mortgagee's rights in the mortgaged property (including the remedies of sale, possession and appointment of a receiver) are exercisable only in good faith for the purpose of protecting or enforcing the security.[33] We think that such a general limitation can provide a

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32 i.e. Consumer Credit Act 1974 sections 137-139 re-enacted to apply whether or not the mortgagor is an individual.

33 There is a similar limitation on the proprietary rights of a mortgagee of a ship contained in the Merchant Shipping Act 1894 section 34:

> **Mortgagee not treated as owner**
> **34.** Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

For examples of the effect s. 34 has on the exercise of the mortgagee's rights in the ship see Temperley, The Merchant Shipping Acts (7th Edition) (Vol. 11 British Shipping Laws), notes to s. 34.

useful check on improper or oppressive action by a mortgagee,[34] without in any way interfering with the activities of reputable mortgagees.

D. Enforcement of the mortgage - the remedies

9.16 Possession We explained in paragraphs 3.24 and 3.25 the inadequacy of the law governing the liability of a mortgagee in possession. The existing rules are open to abuse in that a mortgagee is not liable to account for any benefit he may obtain by taking up occupation of the mortgaged property unless the property is lettable (in the special sense we explained in paragraph 3.24). We doubt if this often arises in practice: no institutional lender is likely even to want occupation for its own purposes. Nevertheless, the opportunity for abuse does exist in the present law. It will be removed to some extent if the mortgagee's right to possession is replaced by the more restricted remedy we propose in paragraph 5.21(e) and if the general principle we explain in paragraph 9.15 is adopted. It might, however, help to put the matter beyond doubt if the mortgagee is specifically made liable to account for any benefit in fact received as a result of occupying mortgaged property. Alternatively, if this causes valuation problems, it could be provided that during such a period of occupation, interest ceases to accrue on the outstanding indebtedness. We invite comments on these suggestions, particularly from lenders who may envisage practical problems in adopting this sort of solution.

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34 cf the similar limitation on the exercise of the mortgagee's right to possession suggested in Quennell v. Maltby [1979] 1 WLR 318 per Lord Denning MR at p. 322. See paragraph 3.23.

9.17 The more important problem about possession is the one we explained in paragraph 3.25, i.e. the mortgagor can be deprived of occupation without financial recompense during a period in which interest continues to accrue on the outstanding indebtedness whilst the value of the property may fall. If this results from the mortgagee in good faith seeking to enforce the security in the most efficient way available, we do not see that the mortgagor has grounds for complaint. However, there is evidence that some mortgagors who have been evicted feel that their mortgagees unnecessarily delayed sale after obtaining a possession order, or allowed preventable deterioration of the property, or made insufficient efforts to obtain a price higher than that necessary to pay off the indebtedness.[35] We do not know whether these grievances are well-founded, and we shall be interested to receive comments on this point. If they are, then we would also welcome views on how the problem can be tackled. We put forward the following alternative suggestions for consideration:-

(a) As a step towards preventing a fall in the value of the property (see paragraph 3.25) the mortgagee could be put under a clear and unequivocal duty to maintain the state of repair and decorative condition of the

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35 See J. Doling, V. Karn and B. Stafford, Report for the National Consumer Council, Behind with the mortgage - lenders, borrowers and home loan debt: a consumer view (1985) pp. 124-126.

property. It may even be feasible to give the mortgagor the right to require the mortgagee in possession to carry out modest or emergency repairs or improvements at the mortgagor's cost, provided that the value of the property was sufficient to ensure that these costs could be recovered out of the sale proceeds.[36]

(b) The mortgagee could be put under a duty to sell the property as quickly as possible once the mortgagor was no longer in possession. This would be a significant change in the law, and we do not think it would necessarily benefit the mortgagor: there must be many circumstances in which a quick sale is in no-one's interest. A variant that may be more acceptable would be to make the duty arise only on (or possibly a fixed period after) the date on which the mortgagee executes the possession warrant: this would enable the mortgagee to choose the time for a sale, but encourage him to allow the mortgagor to remain in occupation until the last possible moment.[37]

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36 It would also be necessary to safeguard the interests of subsequent encumbrancers, and possibly to prevent collusive action by mortgagor and mortagee to defeat unsecured creditors.

37 A mortgagee who has an unexecuted possession order can presumably feel safe in contracting to sell, in exercise of the power of sale, with vacant possession and then have the order executed fairly quickly if the mortgagor seems unlikely to leave voluntarily before the completion date.

(c) Alternatively, interest could cease to accrue on the outstanding indebtedness (i) once the mortgagor gave up possession, or (ii) on or a fixed date after the mortgagee executed a possession warrant (for the reasons we gave in (b) above), or (iii) if the property remained unsold a specified number of days/ months after the mortgagor gave up possession.

In considering which, if any of these options should be adopted, two factors should in our view be borne in mind. The first is that the situation we are dealing with in this paragraph occurs very frequently. Any improvement that can be made in the position of mortgagors in this situation, could benefit several thousand mortgagors and their families each year.[38] The second and counterbalancing factor is that if a mortgagee is to enforce the security, it is in everyone's interest that it should be done as cheaply and efficiently as possible. The practical implications of any further regulation of the mortgagee's exercise of the remedies of possession and sale must therefore be considered carefully.

9.18 Powers and qualifications of a receiver At present, and in the proposals we make in paragraph 5.21, the statutory powers of a receiver are limited to those necessary to receive the income of the mortgaged property. However, as we explained in paragraph 3.48, it is common practice to confer additional wide powers

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38 See the figures we give in para. 1.3 above.

on receivers, sometimes entitling the receiver to take over the entire management of the property from the mortgagor. This raises three questions on which we should be particularly grateful to receive comments. First, is it necessary or desirable for a mortgagee with a fixed charge over land to have a remedy which effectively entitles him to take over the management of the land from the mortgagor? Secondly, if a mortgagee is to continue to have such a remedy, should it (as now) be possible to exercise it after a merely technical default, or should its use be more strictly circumscribed? Thirdly, there are now statutory regulations about the qualifications necessary for a person to act as a debenture receiver or other insolvency practitioner:[39] should regulations on similar lines be imposed on LPA receivers and on those appointed under an express power in a fixed charge? An additional reason for doing so would be to ensure that a receiver is able to meet any liability he may incur to the mortgagor in respect of an improper exercise of his powers. As we explained in paragraph 3.49, since the receiver is deemed to be the mortgagor's agent, the mortgagor may have to take action against the receiver rather than the mortgagee if he has any complaint about the enforcement of the security.

9.19 Foreclosure In paragraphs 3.50-3.56 we explained the unsatisfactory features of the remedy of foreclosure, which lend support to the view that the

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39 Insolvency Act 1985 sections 1-11.

remedy ought to be abolished. However, the most obviously unsatisfactory features of the present law relating to foreclosure could be changed by statute if it was thought that there remains a need for a remedy which results in the mortgaged property becoming vested in the mortgagee. It is noteworthy that Scotland and a number of common law based systems who have carried out mortgage law reform in recent years have retained rather than abolished foreclosure[40] and we invite comments on whether a foreclosure-type remedy is necessary in this country. Our provisional view is that it is not and that it would cause no hardship or inconvenience if it was replaced by a simple right for the mortgagee to apply to the court to sell to itself. We return to this point in paragraph 9.26 but first, in paragraphs 9.20-9.22, we set out the purposes for which we consider foreclosure has been legitimately used in recent years, and the reasons why such use is no longer necessary.

9.20 Foreclosure by local authorities Local authority mortgagees have used foreclosure for two main purposes. The first was for the enforcement of mortgages taken to secure loans made under the Small

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40 See for Scotland the Conveyancing and Feudal Reform (Scotland) Act 1970 s.28; Foreclosure exists in all states of Australia for both general law and Torrens system mortgages: see Sykes on Securities pp 124, 226, 287 and 316.

Dwellings Acquisition Acts 1899-1923 to enable borrowers to acquire or construct a house whose market value did not exceed £5,000.[41] Enforcement of these mortgages was subject to special statutory rules, the operation of which caused problems.[42] In order to avoid these problems, local authorities preferred to use formal foreclosure proceedings. However, the Small Dwellings Acquisition Acts were repealed by the Housing (Consequential Provisions) Act 1985, so no new mortgages subject to these provisions can now be created. Enforcement of the mortgages which were created under the old Acts and are still subsisting is subject to revised statutory rules contained in the Housing Act 1985 Schedule 19, which should eliminate the earlier problems. In any event, in view of the £5,000 market value limit, presumably there are few such mortgages still subsisting.

9.21 The second main purpose for which local authorities have used foreclosure is in relation to council house sales. Various statutory provisions give local authorities a power (in some cases a duty) to sell council houses to tenants at less than the market value, and to secure payment of the purchase price by taking a mortgage over the house sold. These provisions contain measures designed to prevent the purchasing tenants making a quick profit by selling

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41 Small Dwellings Acquisition Act 1899 s.1(1) as amended by the Housing Act 1949 s.44(1).

42 For full details see A. Arden and M. Partington, Housing Law (1983) pp. 196-202 and Fisher & Lightwood pp. 188-191, 330-331. See also Mexborough U.D.C. v. Harrison [1964] 1 W.L.R. 733 and Alnwick R.D.C. v. Taylor [1966] Ch. 355.

within the first few years at the full market price. At one time, the nature of these anti-speculation measures made foreclosure a convenient remedy for local authorities who had to enforce the mortgage within the initial period. However, significant changes made by the Housing Act 1980 and the Housing and Building Control Act 1984[43] should remove the necessity for local authorities to rely on foreclosure. In detail, the position is as follows:

(a) Voluntary Sales The Housing Act 1985 section 32[44] empowers a local authority to sell to its tenants at a discount, and sections 435-6[45] enable the local authority to lend the purchase price to the purchasing tenant and secure repayment by taking a mortgage over the house. As originally enacted in the Housing Act 1957, the anti-speculation measure was a right of pre-emption included in the conveyance giving the local authority the option to re-purchase at (usually) the original discounted purchase price on any proposed disposal within the first five years.[46] If the purchasing tenant defaulted during the pre-emption period, no wholly satisfactory enforcement action was available to the local authority. If it exercised its mortgagee's power of sale it could not exercise

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43 See now the Housing Act 1985.

44 Formerly the Housing Act 1957 section 104.

45 Formerly the Housing (Financial Provisions) Act 1958 s. 43.

46 Housing Act 1957 s.104(3)(c).

the right of pre-emption nor sell to itself[47], but if it sold to a third party there would be a windfall profit for either the defaulting mortgagor (if the sale was at the open market price) or the purchaser (if the sale was at the original discounted price[48]). Local authorities therefore preferred to foreclose rather than sell, despite the obvious unfairness to a mortgagor who had not borrowed the whole of the purchase price. Extensive amendments were made to the relevant provisions of the Housing Act 1957 by the Housing Act 1980 and the Housing and Building Control Act 1984[49], the effect of which is that sales made after August 8th 1980 will not usually[50] contain a right of pre-emption. Instead, a decreasing proportion of the discount is made repayable to the local authority on any disposal within the first five years and the obligation to repay is secured by a further legal charge on the property. This leads to a fairer result if the local authority exercises its power of sale during the

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47 Williams v. Wellingborough Borough Council [1975] 1 W.L.R. 1327.

48 As arguably it had to be by virtue of s.104 (3)(a): see J.E. Adams (1973) 117 Sol. Jo. 168.

49 See now the Housing Act 1985.

50 The exception is sales of houses in National Parks etc., dealt with in para. 9.22 below. Another exception was sales made before 8th August 1980, which continued to be subject to pre-emption rights. Special provision was made for these, but in all cases the pre-emption period will now have expired.

five year period, so it should no longer be necessary to resort to foreclosure. In the case of sales made under the Housing Act 1985 that still contain a right of pre-emption,[51] section 452 and Schedule 18[52] contain a special kind of enforcement measure which resembles a reformed version of foreclosure. This entitles the mortgagee, with the leave of the county court, to vest the mortgaged property in itself as if on foreclosure. However, it must then appropriate from its general funds a sum equal to the open market value of the property and use this sum to pay off prior encumbrancers and the enforcement costs, then the amount due under the mortgage plus the appropriate outstanding proportion of the discount, and then account for any balance to subsequent encumbrancers and the mortgagor. Again, where these provisions apply, it should no longer be necessary to resort to the general remedy of foreclosure.

(b) Mandatory sales: the "right to buy" provisions Sales at a discount under the Housing Act 1985 Part V[53] contain a covenant to repay the appropriate proportion of the discount, with the liability to repay secured by a charge by way of legal mortgage operating in the way described in (a) above. Here again, there appears to be no need for foreclosure in these cases.

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51 i.e. the cases referred to in note 50 above.

52 Formerly the Housing and Building Control Act 1984 s. 19 and Schedule 5.

53 Formerly the Housing Act 1980 Part I as extended by the Housing and Building Control Act 1984.

9.22 Special cases of foreclosure There are cases where a local authority or other body sells, or pays for the adaptation of, a particular type of property subject to a condition restricting the future disposal of the property to a specified category of person. If the local authority or other body also takes a mortgage over the property, some form of foreclosure is a convenient and sensible remedy: it may well be desirable to enable or even require the mortgagee to take the property back into its stock rather than attempt a forced sale in a restricted market. Such restrictions on disposal currently apply to houses sold by local authorities under the Housing Act provisons described in paragraph 9.21,where the house is in a National Park or in an area designated as rural or as of outstanding natural beauty.[54] The statutory quasi-foreclosure system described in paragraph 9.21(a) applies to mortgages of these houses, so the general remedy of foreclosure should not be required.

9.23 A reformed remedy of foreclosure If, despite our conclusions set out in paragraphs 9.19-9.22, there is support for the retention of foreclosure we suggest it could be reformed in one of the two ways we set out in paragraphs 9.24 and 9.25.

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54 The Housing Act 1985 ss. 37 and 157, formerly the Housing Act 1957 s.104C (as amended) and Housing Act 1980 s.19 (as amended).

9.24 The Scottish system The Scottish law on foreclosure is now contained in the Conveyancing and Feudal Reform (Scotland) Act 1970 section 28[55], a copy of which we set out in Appendix B. Briefly it has the following features:-

(a) before applying to the court for foreclosure the mortgagee must have tried unsuccessfully to sell the property on the open market for an amount not exceeding the total due under that and any prior mortgage;

(b) the court then has a discretion (i) to allow the mortgagor up to three months to redeem and/or (ii) to order sale of the property at a price it fixes, with or without giving the mortgagee leave to bid in the sale;

(c) a decree of foreclosure extinguishes the right to redeem, but the mortgagor remains liable on the personal covenant to repay.

A similar system could be adopted in this country. The advantages of such a system are that it seems to remove any possibility of either party making a windfall profit, and it avoids the necessity for a formal valuation of the property. However, it may not be appropriate in the English system to leave the courts without any indication how to exercise their discretion to order a sale.

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55 As amended by Redemption of Standard Securities (Scotland) Act 1971 s.1.

9.25 Foreclosure plus accountability Another possibility would be to extend to all mortgages the provisions contained in the Housing Act 1985 section 452 and Schedule 18 and described in paragraph 9.15(a) above. Essentially, this requires a mortgagee who forecloses to conduct a formal valuation of the property, and to account for a sum equal to that value as if it represented proceeds of sale. This has the advantage of removing the possibility of a profit for the mortgagee, but may lead to difficulties in cases where the formal valuation is disputed.

9.26 Abolition plus extension of the power of sale We believe the simplest solution would be to abolish foreclosure but give the mortgagee the right to apply to the court for leave to exercise its powers of sale in favour of itself. This can already be done indirectly in two ways. First, it can be done via a foreclosure action, i.e. the mortgagee brings foreclosure proceedings, then requests a sale under the Law of Property Act 1925 section 91(2) and asks for leave to bid in the sale.[56] Secondly, a mortgagee can sell to a company in which the mortgagee is closely involved, without even approaching the court.[57] Since it can already be done indirectly, there seems little

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56 Fisher & Lightwood pp. 370-371; this is allowable because the objection to a mortgagee purchasing is that "a sale by a person to himself is no sale at all" (Farrar v. Farrars Ltd. (1888) 40 Ch. D. 395 at 409 per): a sale under s.91(2) is by the court, not by the mortgagee.

57 Tse Kwong Lam v. Wong Chit Sen [1983] 1 W.L.R. 1349 (P.C.)

objection to permitting it to be done directly in exceptional circumstances, subject to some safeguard such as the mortgagee being required to satisfy the court that it is the most advantageous[58] method of realising the property.

9.27 Should foreclosure be reformed or abolished? We suggest that if, as seems to us to be the case, foreclosure no longer serves a useful purpose, it would be better to abolish it outright and extend the power of sale in the way we suggest in the preceding paragraph. However, we would welcome comments from anybody who does see an actual or potential use for foreclosure, as well as comments on how, if at all, it should be reformed if it is to be retained.

E. Enforcement of the mortgage - exercise of the remedies

9.28 Powers arising and becoming exercisable We have already referred[59] to the artificiality of the statutory distinction between the time when a mortgagee's powers arise and the time when they become exercisable. The only person for whom the date on which the mortgagee's powers arise has practical

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58 i.e. advantageous from the point of view of all parties.

59 See paragraphs 3.57 et seq. above.

significance is a purchaser from the mortgagee who is selling in exercise of the power of sale: by section 104(2) of the Law of Property Act 1925 such a purchaser is concerned to see that the power of sale has arisen, but not that it is exercisable. Subject to this point we can see no real need to persist with an artificial interim date on which the mortgagee's powers arise.

9.29 Protection of purchasers If there is to be no interim stage at which the mortgagee's powers arise, should the purchaser instead be required to check that the mortgagee has become entitled to exercise its powers? We can see objections to requiring purchasers to undertake such investigations. It could make sales by mortgagees slower and more expensive and deter mortgagees from selling without a court order, and from allowing mortgagors to remain in occupation until just before sale (see paragraph 9.17). On the other hand, if the mortgagor is in occupation and opposed to the sale, should a purchaser be relieved of all responsibility for ensuring that the mortgagee is in fact entitled to enforce the mortgage, even when the property to be sold is the mortgagor's home?[60] The suggestion we put forward for consideration is that in the case of protected mortgages where the mortgagor is in occupation at the time of the sale, a purchaser from the mortgagee should have to satisfy himself either that the mortgagor consents to the sale, or that the

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60 Even at present, there may be doubt whether an improper exercise of the power of sale can overreach the rights of a mortgagor in possession of registered land: cf City of London Building Society v. Flegg [1986] 2 WLR 616.

sale is made pursuant to a court order. In all other cases, (i.e. where the mortgagor is not in occupation, or if the mortgage is not protected) we suggest that a purchaser acting bona fide should be concerned only to see that the mortgage deed does give the mortgagee the power he is purporting to exercise.[61] We invite comments on the points in this paragraph.

9.30 Exercise of the power of sale In paragraph 3.63 we referred to the case of Duke v. Robson[62] and the hardship that may arise when a mortgagee exercises its power of sale after the mortgagor has contracted to sell. We can see no simple solution to this problem. The rule could be reversed so that the mortgagee's power of sale is not exercisable for so long as the mortgagor is bound by contract to sell the mortgaged property. However, to prevent abuse, it would be necessary to add a proviso that the mortgagor's sale must be completed within a reasonable time, and we can see difficulties in deciding whether a reasonable time had elapsed in the particular circumstances. Under the present law (and if the suggestions we make in the preceding paragraph are accepted) a prospective purchaser from the mortgagee who had notice that the mortgagor had contracted to sell would have to satisfy himself that a reasonable time had elapsed since the mortgagor's contract. The only safe way of ensuring that such a purchaser was put on notice would be for all those who contract to purchase from mortgagors to protect their estate contracts by registration as a

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61 Provided, as at present, he has no notice of any irregularity: see Fisher & Lightwood pp. 366-7.

62 [1973] 1 WLR 257.

Class C(iv) land charge or by entry of a notice at the Land Registry. In view of all this, we do not think it would be satisfactory to reverse the rule. A more promising possibility might be to keep the rule as it is but require the mortgagee to compensate the mortgagor for any loss caused. This could be done by providing that if a mortgagee sells after having been notified that the mortgagor has already contracted to sell to someone else, the mortgagee is liable to compensate the mortgagor for the loss he suffers by being put in breach of contract. It would still be necessary to provide that the mortgagee's liability ceases if the mortgagor's contract has not been completed after a reasonable time has elapsed, but at least the question of whether or not a reasonable time had elapsed would concern only the mortgagor and mortgagee, and not a purchaser from the mortgagee. A purchaser from the mortgagor would be in no better (or worse) position than he is in at the moment. The only difference that it could make in conveyancing practice is that it would make it prudent for all mortgagors to notify their mortgagees on entering into a contract to sell. Since it is usually necessary anyway for mortgagors to notify their mortgagees before completion of the sale, this difference may not be very significant. We shall be interested to hear comments on this suggestion, and on any alternative ways of dealing with this problem.

9.31 When should the mortgagee's powers become exercisable? As far as mortgagor and mortgagee are concerned the question of when the mortgagee becomes entitled to exercise its powers is of the utmost importance. Common sense suggests that there should be

simple rules which enable either party to determine whether at any given point in time the mortgagee's powers have become exercisable. However, the situation is complicated in that the rules must be wide enough to allow mortgagees to fulfil their legitimate expectations and, at the same time, offer protection to mortgagors against over-zealous enforcement. In addition, the rules must be sufficiently flexible to take account of the many different types of mortgage and different purposes for which they are granted. It seems clear that these factors will tend to militate against simplicity.

9.32 To begin with we suggest that it should be a basic principle of the mortgage relationship that mortgagees can exercise their remedies only on:

(a) financial default consisting of a failure to comply with a financial obligation at a time when it was originally intended that the obligation would be met. The aim is to include all types of payment default (interest, capital, insurance premiums, etcetera) but, by linking enforcement to the original intentions of the parties, to exclude mere technical default; or

(b) non-financial default consisting of a failure to comply with a non-financial obligation in circumstances where the failure threatens the value or the availability of the security. The purpose here is to permit enforcement where the breach of obligation represents a real threat to the mortgagee's security but

to prevent enforcement where the breach is trivial and can be remedied easily; or

(c) any other event which threatens the mortgagor's ability to comply with a financial obligation or otherwise threatens the value or the availability of the security. The intention here is to include miscellaneous events (compulsory acquisition, impending insolvency, a fall in the value of the mortgaged property etcetera) which affect either the mortgagor's financial standing or the value of the security but do not involve any element of default on the part of the mortgagor. It may be that this ground of enforcement should be limited, for example to cases in which there is an immediate risk of serious loss to the mortgagee.

In the following paragraphs we shall refer to (a), (b) and (c) above as "enforceable events." An important point to consider is whether these enforceable events should be overriding (see paragraph 9.6) i.e. whether it should be possible to vary or exclude them by contrary provision in the mortgage deed. Our tentative view is that it would be acceptable for them to be made overriding, since those who genuinely wish to provide for the mortgage to be enforceable at will could continue to do so by making it clear at the outset that the loan is repayable on demand, and that demand may be made at any time in the mortgagee's discretion.[63] However we invite comments on this question.

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63 We anticipate that this would fall within (a) above.

9.33 In addition to these limitations on the circumstances in which a mortgagee becomes entitled to exercise its remedies, the general principle we suggest in paragraph 9.15 would place express constraint upon the purposes for which those remedies may be exercised. In other words, mortgagees would be permitted to exercise their remedies only for the purpose of enforcing or protecting their security.

9.34 Methods of conferring further protection on mortgagors Clearly, by limiting the circumstances in and purposes for which mortgagees may exercise their remedies, mortgagors are afforded some degree of protection. It remains to be considered whether some or all mortgagors should receive further protection in the context of enforcement and, if so, how this may be effected. It seems to us that there are several ways in which mortgagor protection at this level could be achieved. First, it would be possible to define more closely the various types of event encompassed by our "enforceable events", making detailed provisions concerning each event and the way in which it would entitle a mortgagee to enforce. This approach may have the advantage of certainty but would lack flexibility. In addition, to give adequate effect to the legitimate expectations of the parties there would need to be different provisions for different types of mortgage; this would increase the complexity of the provisions. Secondly, protection could be achieved by means of procedural safeguards. For example, "enforcement notice" procedures similar to those contained in the

Consumer Credit Act 1974[64] could be extended to other types of mortgage. Thirdly, the existing discretionary powers of the court to delay or restrict enforcement could be modified and the prohibition on enforcement without an order of the court which currently applies only to mortgages within the Consumer Credit Act 1974[65] could be extended to other mortgages. We return to these second and third methods in paragraphs 9.36-9.39.

9.35 Which mortgagors require additional protection Whichever method of additional protection is chosen, it is necessary to consider whether it should apply to all mortgages, or only to protected mortgages (i.e. the category we suggest require special protection in paragraphs 9.2-9.4). Our provisional view is that mortgages which do not fall within the protected class should not be subject to any additional protection against enforcement. We think it would unnecessarily increase costs if mortgagees were required to obtain a court order or go through a notice procedure before they become entitled to enforce unprotected mortgages. Instead we would prefer to rely upon the flexible approach afforded by the basic principles we set out in paragraphs 9.32 and 9.33. If a commercial mortgagee seeks to enforce for an improper purpose or where no enforceable event has occurred, then, in accordance with general principles, the

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64 Sections 76 and 87-89 Consumer Credit Act 1974 and The Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 S.I. 1983 No. 1561.

65 Consumer Credit Act 1974 s. 126.

mortgagor will be able to apply for an injunction to restrain the mortgagee's actions. We suspect that in the vast majority of cases it will be perfectly clear whether or not a mortgagee has legitimate grounds to enforce. Also, a mortgagor who refuses to leave the mortgaged property when the mortgagee decides to exercise the power of sale will continue to be able to ensure that the matter is brought before the court, since the mortgagee will still need a court order before taking possession if it is to avoid the possibility of criminal sanctions under the Criminal Law Act 1977 section 6.

9.36 An enforcement notice procedure In the case of protected mortgages, the case for increasing the level of protection beyond that provided by the principles we suggest in paragraphs 9.32 and 9.33 is stronger. Indeed it is necessary to so do in order to ensure that some protected mortgagors do not receive less protection than they have under the present law. One method of enhancing the protection given to protected mortgages would be to introduce an enforcement notice procedure similar to the default and enforcement notice procedures contained in the Consumer Credit Act 1974. We set out the relevant provisions of the Act and supporting regulations at Appendix C. Under such a procedure it is envisaged that a mortgagee who wished to exercise his remedies would first have to serve an enforcement notice on the mortgagor. An enforcement notice could be served only after an enforceable event had occurred, or maybe only while an enforceable event was continuing (that is, continuing non-payment or breach of obligation). We suggest that an enforcement notice would have to be in a prescribed form and specify:

(a) The date of the notice.

(b) The nature of the enforceable event.

(c) The action (if any) to be taken by the mortgagor to remedy any default constituting the enforceable event, and the date by which such action must be taken.

(d) An explanation of the effect of service of the notice, including the possible consequences of failure to carry out any action specified in paragraph (c).

(e) Details of where to obtain help and advice.

We see the enforcement notice as serving two purposes: in addition to being a preliminary step in the process of enforcement, it may have the effect of generating dialogue between mortgagor and mortgagee. Thus, the service of a notice may in practice lead to enforcement action being averted by the rectification of a breach or the negotiation of new payment terms. If the breach is not remedied (or if the enforceable event involved no default on the part of the mortgagor: see paragraph 9.32(c)) then the mortgagee should become entitled to apply to the court for the appropriate enforcement order (sale, possession, etcetera), or to pursue the appropriate remedy extra-judicially, if this is possible (see paragraph 9.38). If the breach is remedied, there are two possible ways of dealing with the matter. One way is to provide that the breach is then treated as if it had never occurred, with the result that the mortgagee's right to pursue the remedy

ceases.[66] Alternatively, the mortgagee might retain a right to apply to the court for an enforcement order notwithstanding that the mortgagor had complied with the requirements of the enforcement notice: such a provision may be desirable to deal with exceptional cases of persistent late payment or failure to comply with obligations until the last minute.

9.37 We believe that a notice procedure such as the one outlined in the preceding paragraph would benefit some mortgagors, but we are also conscious that it could make enforcement more cumbersome and expensive. For this reason we are anxious to obtain the views of all those involved in mortgage enforcement on the merits of such a procedure and on specific ways in which, if acceptable in principle, a procedure could be made to operate to the maximum benefit of mortgagors at the minimum cost and administrative inconvenience. We would be particularly interested to hear from those who have already had experience of the workings of the Consumer Credit Act 1974 default and enforcement notice procedures,[67] and of the similar notice procedures introduced in Scotland by the Conveyancing and Feudal Reform (Scotland) Act 1970.[68]

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66 cf Consumer Credit Act 1974 section 89.

67 See n.64 above.

68 Sections 19-24, Schedule 3 Condition 9 and Schedule 6. Examples of other types of notice procedure which are instructive in this context are those required by (a) Law of Property Act 1925 s. 146 and (b) Landlord and Tenant Act 1954 s. 25 and the Landlord and Tenant Act Part II (Notices) Regulations 1983 S.I. 1983 No. 133.

9.38 Extra-judicial enforcement If enforcement action has to be taken it is clearly cheaper and probably more efficient if it can be done without the involvement of the court. In the case of commercial mortgages we understand that the most commonly used methods of enforcing the security are extra-judicial sale or appointment of a receiver; we are not aware of any reason why these practices should be changed. However, in the case of protected mortgages (see paragraphs 9.2-9.4) the position may be different: should a mortgagee be required to obtain a court order before exercising any remedy? We are not sure how much practical difference it would make if a court order was always necessary, since action without a court order is already severely circumscribed by the Consumer Credit Act 1974 section 126 (paragraph 3.66 above) and the Criminal Law Act 1977 section 6 (paragraph 3.65 above). Also, it would not affect the present practice adopted by most mortgagees of encouraging mortgagors to sell the mortgaged property themselves, thereby averting a "forced sale": it is generally recognised that this expedient, where it is possible, results in a more efficient sale with lower costs and at a higher price. However, there may be cases where a requirement to obtain a court order could cause unnecessary expense or difficulty, for example where the mortgagor has disappeared, or has vacated the property voluntarily but is not prepared to co-operate by selling it himself. On the other hand, if enforcement without a court order continues to be permissible, there remains a danger that an unscrupulous mortgagee will pressurise a mortgagor into leaving the premises when the circumstances are such that the court would have refused to grant an immediate possession order. In the light of these problems, we invite comments on whether

or not it should always be necessary to obtain a court order to enforce a protected mortgage.

9.39 Jurisdiction of the court to delay or prevent enforcement We propose no change in the present position whereby in a non-protected mortgage the court has no jurisdiction to delay or prevent enforcement once the mortgagee has established that the right to take the appropriate enforcement action has become exercisable. The court already has jurisdiction to delay or prevent enforcement of protected mortgages (see paragraphs 3.68 and 3.69). We propose that this jurisdiction should be amended so that:-

(a) it is exercisable whenever a mortgagee seeks to exercise any remedy. This would cause no problems if a mortgagee had to obtain a court order in order to exercise any remedy (see paragraph 9.38). If, however, extra-judicial enforcement is to be permitted we suggest the court's jurisdiction should be exercisable on application by the mortgagor as well as on application by the mortgagee to enforce the mortgage.

(b) the court has discretion to delay or withhold any order, not merely a possession order (paragraph 3.69(b) above). This is already the case under the Consumer Credit Act 1974.

(c) the court's discretion is made wider than under the present Administration of Justice Act jurisdiction. In particular the court should be entitled (but not obliged: see

paragraph 9.36 above) to refuse any enforcement order if there is no, or no continuing, default or threat to the security (see paragraph 3.69(d)).[69] A more difficult question is whether it should be widened to give the court discretion to require the mortgagee to accept reduced instalment payments (perhaps comprising payment of interest only) even when the mortgagor is not likely to be able to make up all arrears and comply with the originally agreed payment schedule within a reasonable period (see paragraph 3.69(e)). We understand that in the sort of situation described in paragraph 3.69(e) most mortgagees in practice make great efforts to arrange a rescheduling of the payment obligations. However, there is a wide variation in the enforcement policies of different types of mortgagee[70], and it may be that the court ought to be able to insist that an unsympathetic mortgagee accepts a revised schedule of repayments that the court considers another mortgagee might reasonably have accepted. One difficulty might be to decide on the grounds on which the court was to exercise such a discretion. In the present law, in the relatively few cases in which the Consumer Credit Act 1974 applies, the court may, "as [it] considers just" order payment "by such instalments, payable at such

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69 This would confirm the Court of Appeal decision in Western Bank Ltd. v. Schindler [1977] Ch. 1. See para. 3.69(d) above.

70 We discuss this point in para. 3.76 above.

times, as the court, having regard to the means of the debtor ... considers reasonable."[71] It may not be appropriate in the case of all protected mortgages to require the court to take into account only what it considers just and the means of the mortgagor. The court ought perhaps also to be satisfied that the mortgagee will not be penalised financially by the rescheduling (for example, any appropriate interest charge to compensate for delayed payments should be ordered) and possibly also that the value of the property is sufficient to cover the total amount that will become due to the mortgagee (including all interests, costs and expenses). We welcome comments on these points, and on the general principle of widening the court's jurisdiction in this way.

9.40 Liability for exercise of remedies As we explained in paragraph 3.71, the fundamental problem about the extent of the liability of a mortgagee (and a receiver appointed by the mortgagee) to take proper care in exercising remedies is the uncertainty caused by decisions of the court made in relation to different legal relationships, often in the context of different areas of law. The obvious way of removing, or at least lessening, the uncertainty is to produce a statutory formulation of the liability of (a) a mortgagee for his own acts (b) a receiver for his own acts and (c) a

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71 Consumer Credit Act 1974 s. 129.

mortgagee for the acts of a receiver appointed by him. The statutory provision could also clarify the extent to which the liability extended beyond the mortgagor to guarantors, subsequent encumbrancers and unsecured creditors. Also, for the reasons we gave in paragraph 3.49, we think it should be made clear that the liability of a receiver for his own acts is no less extensive than that which a mortgagee would have incurred in similar circumstances. Subject to this point, we suggest that the objective should be simply to codify the existing law, rather than to make any alterations in the nature and extent of the liabilities of mortgagee and receiver.

F. Other Matters

9.41 Consolidation of mortgages The doctrine of consolidation in its present form has been severely criticised (see paragraph 3.22). We suspect that the only reason why mortgagees choose to retain the right to consolidate is that it is no disadvantage to them to do so, and there is no incentive to relinquish the right. If this is correct, and the right is no longer exercised, then we suggest that it should be abolished outright. If, however, mortgagees have positive reasons for wishing to retain the right (and we shall be interested to receive comments on this point) it may be possible to modify the doctrine to reduce its potential unfairness although our tentative view is that it would be difficult to do so without making the right too restrictive to be useful. For example, a major criticism of the right in its present form is that it can be a trap for the unwary purchaser of mortgaged property. This could be removed by

restricting the right to cases where the relevant equities of redemption are now all vested in the same person, but such a restriction would enable any mortgagor to escape from a threatened exercise of the right simply by transferring one of the mortgaged properties. On the other hand, if this trap for purchasers cannot be removed, is it worth making any other change in the doctrine (for example by restricting its operation to cases in which, at the date when the latest mortgage was granted, all relevant equities of redemption were vested in that mortgagor and all relevant mortgages were vested in that mortgagee)? Our provisional view is that it is not, and that if there is a real demand for the continuation of the right to consolidate it should continue in its present form. However, we invite comments on this, as well as on the basic question of whether the right to consolidate could be abolished outright.

9.42 Tacking of further advances A major problem in dealing with the question of adjusting priority by tacking further advances is that it is of considerable practical importance in relation to debentures and charges of personal property as well as in relation to land mortgages. For this reason we do not think this is an appropriate context in which to re-examine the basic principle of tacking further advances. Nevertheless, some of the detailed problems we mentioned in paragraph 3.21 can and should be dealt with now. To some extent, they will become less important if the proposals we make in Part 5 for registration of all mortgages are accepted; if all prior mortgages are registered, it is easier to set up an efficient notice system. Even then, some problems

will remain: for example we suggest it should be made clear that a mortgagee does not have constructive notice of a later mortgage solely by virtue of its registration in the Companies Registry.[72] Also, we suggest that something should be done about the anomalous treatment of registered charges which results from the Land Registration Act 1925 section 30. In our Working Paper No. 67,[73] we put forward for consideration the suggestion that the obligation on the registrar to notify registered chargees of later charges should be removed, and that registered charges should be governed by the same rules as those applicable to other land mortgages. However, the views expressed to us in consultation were that the Land Registration Act system works well (it would of course be even more effective if all mortgages were registrable). Our present view is therefore that it is better to deal with the anomaly by extending the scope of section 30 rather than repealing it. In other words, the registrar should be required to notify the holder of any charge registered or protected on the register (provided the charge secured further advances) before making any subsequent entry. Similarly, if the holder of any charge registered or protected on the register is under an obligation to make further advances, all subsequent encumbrances (not just registered charges) should take effect subject to any

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72 Para. 3.21 above.

73 Transfer of land: Land Registration (Fourth Paper) (1976) Law Commission Working Paper No. 67 paras. 114-117.

further advance made.[74] Finally, we suggest that the problem we refer to in paragraph 3.21(e) should be settled by making it clear that a mortgagee can continue to tack advances made after a default if the mortgage deed originally imposed on the mortgagee an obligation to make further advances.

9.43 Transfer of the equity of redemption We are satisfied that the best practical solution to the problems we discussed in paragraph 3.77. is for the mortgagee to be made a party to any transfer on sale made by the mortgagor subject to the mortgage, and for the transfer to contain (a) an express release by the mortgagee of all the liabilities of the original mortgagor and (b) a direct covenant by the transferee with the mortgagee to observe all the provisions of the mortgage (including the payment provisions). However, this depends on the mortgagee being asked to give, and giving, consent to the transfer on these terms. Should it be made mandatory for the mortgagor to obtain consent, and for the mortgagee to give such a consent? Our tentative view is that the actual (as opposed to the potential) problems caused by transfers of the mortgagor's interest are not sufficient to justify such a change at this stage. However, if this view is not accepted and some change is thought desirable a possible compromise might be to provide by statute that a transfer on sale (subject to express provision to the contrary) would, if made with the consent of the mortgagee, automatically operate to release the

74 See Land Registration Act 1925 s. 30(3) and para. 3.21 above.

transferor from all liability under the mortgage (including the personal liability) and to make the transferee fully liable to the mortgagee. To make such a provision effective, it may be advisable to provide also that a mortgagee may not unreasonably withhold consent to a transfer.[75] The mortgagor would be left free to deal with his interest without the mortgagee's consent, but the dealing would not release him from personal liability.

9.44 Transfer of the mortgagee's interest We explained in paragraph 3.76 that the development of a secondary mortgage market in this country could result in it becoming relatively commonplace for mortgagees to transfer their interests to third parties. In view of this it is desirable to reconsider the question of allowing mortgagees to transfer their mortgages without the consent of the mortgagor. If mortgagees are to continue to have their present wide discretion to vary interest rates and to choose when and how to call in the loan and enforce the security, is it satisfactory that they should be free to transfer the mortgage to whoever they wish without the mortgagor's consent? An initial point to bear in mind is that there are difficulties in providing that no mortgage may be transferred without consent of the mortgagor. First, we believe it would be necessary to adopt provisions to ensure that the mortgagor has a genuine opportunity to

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75 Whether or not a refusal was reasonable would, we suggest, depend on whether the reasons for refusal depended on the transferee's ability to perform and observe the terms of the mortgage, including the payment obligations.

withhold consent to an impending transfer: without such provisions we would anticipate that many mortgagees would include as a standard term in all mortgage deeds a blanket consent by the mortgagor to all future transfers. The provisions of the Local Government Act 1986 could be adopted for this purpose: briefly, Section 7 provides that the consent must specify the name of the transferee, and ceases to have effect if the transfer is not made within six months after the consent is given. Section 7 also provides that the consent may be withdrawn by notice in writing at any time before the transfer is made, and provides for regulations requiring the local authority mortgagee to give the mortgagor specified information about the transferee. The regulations made under Section 7 are reproduced at Appendix D to this Working Paper. We think such provisions would be reasonably effective in ensuring that a mortgagor had a real opportunity to object to a proposed transfer, but we are conscious that such a procedure would impose considerable expense and administrative inconvenience on mortgagees who wish to transfer their mortgages. The second difficulty with imposing restrictions on the right to transfer the mortgage is that there are many other methods by which a mortgagee can transfer the benefit and control of the mortgage apart from by outright transfer. There may be problems in imposing equally effective restrictions on all such methods. A third difficulty is that there may be circumstances in which a refusal of consent by a mortgagor might be quite unreasonable. It would obviously not be sensible to require a mortgagor to consent to a transfer by operation of law, or pursuant to a court order, for example, and there are other less clear-cut examples: should a mortgagor be entitled to withhold consent to a proposed transfer by a liquidator

or trustee in bankruptcy of an insolvent mortgagee? This third difficulty would be overcome by providing that the mortgagor's consent to a transfer must not be withheld unreasonably, although there may remain some disagreement over what constitutes an unreasonable withholding of consent. In view of all these difficulties, it is clearly not an ideal solution to the problem of transfer of mortgages to provide that no transfer of the mortgage can be made without the informed consent[76] of the mortgagor, even if there is a proviso that such consent is not to be unreasonably withheld. Nevertheless our tentative view is that such a solution is workable and may have to be adopted if it is not possible to reduce the importance to the mortgagor of the identity of the mortgagee by curtailing the mortgagee's present discretions in relation to rates of interest and enforcement of the security. However we welcome comments from all those involved or likely to be involved in the future in the transfer of mortgages, particularly from anyone who considers that there may be problems in this area that we have overlooked.

9.45 Discharge of the mortgage The statutory provisions we discussed in paragraph 3.78 could be simplified whilst retaining the present basic principle, which we take to be that the mortgage is

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76 i.e. a consent given in accordance with a procedure like that laid down in Section 7 of the Local Government Act 1986.

discharged by the discharge of liabilites under it [77] but that the execution of a receipt in prescribed form operates as conclusive proof of discharge, subject to fraud. An obvious simplification would be to have only one prescribed form of receipt: we can see no reason why the same form should not be used for registered and unregistered charges, and for building societies and all other kinds of mortgagee although it may be desirable to provide that the form should be endorsed on the mortgage deed if the mortgage is of unregistered land, but contained in a separate document if of registered land. More importantly, we suggest that the form should not name the payer of the money, and should not be capable of operating as a transfer of the mortgage. This would avoid the problems we explained in paragraph 3.78, and we would not expect it to cause any inconvenience or hardship. However, we welcome comments on this point, particularly from institutional lenders.

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77 Subject to making the appropriate cancellation in the register in the case of a registered charge: Land Registration Act 1925 s. 35.

PART 10: SUMMARY OF CONSULTATION POINTS

10.1 The objective of this Working Paper is to promote discussion of the various problems seen in the English law of land mortgages and to put forward for consideration some provisional proposals for their solution. The importance and complexity of the subject make wide consultation essential, and we welcome comments, criticisms and alternative proposals on all the issues we discuss. Throughout this Working Paper we have drawn attention to specific points on which we would like to receive comments. This is not of course intended to preclude discussion and comment on any other points. However, by way of a summary, we list below those points on which we have specifically invited consultation.

10.2 **Structural reform** Our central proposal (Proposal I) is that all existing methods of mortgaging interests in land should be abolished and that a new sui generis Formal Land Mortgage should be created by statute for use in relation to any interest in land. Our provisional view is that this is the best solution to the problems in and arising out of the present structure of mortgage law. There are, of course, other possible solutions, and we put forward three other proposals for structural reform, each of which should be seen as alternative to Proposal I. Proposal II is to confine the use of the Formal Land Mortgage to legal estates in land, preserving

the existing methods of mortgaging and charging equitable interests. Proposal III is to abolish the mortgage by demise, re-define the charge by way of legal mortgage to incorporate most of the features suggested for the Formal Land Mortgage in Proposal 1, and simplify the existing methods of mortgaging and charging equitable interests. Proposal IV, the least radical, is to make no change in the existing structure of mortgage law but to apply to existing types of mortgage some of the suggestions made in Proposal 1 in relation to Formal Land Mortgages. The principal point on which we invite views is whether Proposal 1 should be adopted, or whether any of the alternatives put forward in Proposals II, III or IV is preferable.

10.3 **Proposal I: Formal and Informal Land Mortgages** In Part 5 we set out our detailed proposals on how the new Formal Land Mortgage system would work. We suggest making statutory provision for Informal Land Mortgages, if it is thought desirable that it should continue to be possible to mortgage interests in land informally. We discuss the nature of the relationship to be created between the parties to a Formal Land Mortgage and an Informal Land Mortgage, and put forward suggested rules to govern such matters as formal requirements, registration and priority. We also consider whether the opportunity should be taken to increase standardisation of mortgage documents by prescribing that Formal Land Mortgages must be in a standard form and/or incorporate Standard Conditions. We welcome comments on all these aspects of Proposal 1, and

in particular we would like to have views on the following points:-

(a) **Informal mortgages**

Should informal mortgages continue to be recognised? If so, should writing be required for their creation? (5.4)

(b) **Registration of mortgages of legal estates**

With unregistered land, should all Formal and Informal Land Mortgages be registrable as land charges, even when the mortgagee holds the title deeds? (5.7 and 5.9) If not, should the existing priority rules for mortgage protected by deposit of title deeds be changed? (3.14 - 3.17, 5.12).

(c) **Priority in registered conveyancing**

Our proposal is that all mortgages should be either registered or protected on the register of title: can the equitable priority rules that would apply to mortgagees that fail to protect themselves on the register be simplified? (5.12).

(d) **Mortgages of equitable interests**

In unregistered land, what problems would arise if mortgages of trust equitable

interests were registrable as Class C(iii) land charges against the name of the holder of the underlying legal estate? (5.18)

(e) **Documents of title**

Should first Formal Land Mortgagees have a statutory right to posession of documents of title? If not, should Land Registry practice in relation to the issue of land and charge certificates be changed? (5.25)

(f) **Leasing powers**

How should leasing powers be distributed between mortgagors and mortgagees? What would the reaction of lenders be to the distribution we suggest in paragraph 5.27(2)? (5.27)

(g) **Standard forms**

Would the omission of financial terms from a standard form deed (i.e. leaving them to be incorporated by reference to a collateral document) cause any difficulties? (5.33)

(h) **Standard Conditions**

Are conditions concerning (i) the physical state of the mortgaged property, (ii)

insurance, leasing and consolidation, and (iii) the remedies of mortgagees, appropriate topics for standardisation? Are any other areas suitable for standardisation? (5.36)

(i) **Standard documentation**

If either standard form mortgage deeds or Standard Conditions are thought to be desirable, how should they be documented? (5.44)

(j) **Special types of mortgage**

Are there any considerations concerning specific types of mortgage (for example, mortgages of agricultural land) which would make Proposal I inappropriate for those mortgages? (5.46)

10.4 **Mortgages of equitable interests** The difference between Proposal I and Proposal II lies in the treatment of mortgages of equitable interests. We believe that the Formal Land Mortgage and the Informal Land Mortgage can be used in relation to equitable interests in the way we suggest in Proposal I and we invite views on this point. If this conclusion is not accepted, the following questions arise:-

(a) As a matter of general principle, what are the merits of ensuring that mortgages of

equitable interests continue to be governed primarily by personal property principles, rather than be assimilated into the law relating to mortgages of legal estates and interests? (3.5, 3.19, 5.16-5.19, 6.1)

(b) If Proposal I is not adopted, should priority of mortgages of trust equitable interests continue to be governed by the rule in Dearle v. Hall? (3.18, 3.19, 6.2, 6.5)

(c) More specifically, which of the three possible options we put forward in Proposal II for dealing with mortgages of equitable interests is preferable, i.e. should the existing system be retained, or the mortgage by assignment be abolished, or the consensual equitable charge be abolished? (6.2-6.4)

10.5 **Further Reforms: Proposal V** In Proposal V we put forward for consideration a series of tentative proposals for reforms in relation to the rights, duties, protection, and remedies of the parties, both during the mortgage and on its enforcement. This Proposal is primarily intended to be combined with Proposal I: the creation of a new type of mortgage provides an opportunity for, and to some extent necessitates, a reconsideration of all these points. However, it could also be combined with Proposals II, III or IV, and indeed many of the issues discussed in Proposal V could or should be dealt with even if no change at all is made in the structure of mortgage law. We therefore welcome comments on all aspects of the

matters we discuss in Proposal V, not just on the provisional proposals for change we put forward. In particular, views are specifically sought on the following points:-

(a) **A protected class of mortgage**

(i) At present, differently defined classes of mortgage are affected by various different statutory protection provisions: is it feasible to have a single protected class of mortgage and if so how should it be defined? (9.2)

(ii) We put forward for consideration four separate Options for a definition of the protected class: Option I is essentially that the class should consist of all those mortgages at present subject to the main body of the protection provisions of the Consumer Credit Act 1974, plus any other mortgage where the mortgagor is an individual (rather than a corporate body) and the mortgaged property is used for residential purposes by the mortgagor or his family. One of the reasons for including all mortgages at present covered by the Consumer Credit Act 1974 is to make it possible to remove mortgages of land from the Consumer Credit Act 1974 completely. Options II, III and IV are variations on Option I. We invite comments on these four Options. (9.2 and 9.3)

(iii) A specific problem with the definitions we suggest in Options I to IV is that some mortgages would be included purely for the purpose of simplifying the definition of the class: how many mortgages are likely to come within this category, and what problems could be caused by their inclusion? (9.2)

(b) **Restrictions on and regulation of the terms of the mortgage**

(i) Which (if any) of the statutory provisions that govern the relationship of the parties should be excludable or variable by express or implied terms of the mortgage deed? (9.6)

(ii) Is it either feasible or desirable to regulate the right of mortgagees to vary interest rates? How could regulation best be achieved? Should regulation apply to all mortgages or only to those within the protected class? (9.8)

(iii) Should sections 93-95 of the Consumer Credit Act 1974 be re-enacted to apply to all mortgages or should these matters be left to the general jurisdiction discussed in paragraphs 9.13 and 9.14? (9.9)

(iv) Should mortgagees continue to be entitled to charge interest in lieu of notice to redeem? (9.12)

(v) Is it possible or desirable to have a single statutorily defined jurisdiction to strike out or vary mortgage terms? (9.13 and 9.14)

(c) **Enforcement - the remedies**

(i) How, if at all, should mortgagees who go into occupation be made to account for any benefit received? (9.16)

(ii) Is there any evidence of the abuse of the remedy of possession we refer to in paragraph 9.17? If so, how should the problem be tackled? (9.17)

(iii) Should LPA receivers have power to manage (as opposed to receive the income of) the mortgaged property? If so, should the power to appoint a receiver be more closely regulated, and should LPA receivers be subject to the same qualification requirements as debenture receivers? (9.18)

(iv) Is a "foreclosure-type" remedy still necessary? If it is, how can the unsatisfactory features of the present foreclosure system best be eliminated? (9.19-9.27)

(d) **Enforcement - exercise of the remedies**

(i) Should a purchaser from a mortgagee be under any onus to ensure that the mortgagee's power of sale is properly exercised? Should the situation where the mortgagor is in residential occupation of the mortgaged property and opposed to the sale be treated differently from other situations? (9.29)

(ii) How can the potential hardship that may arise as a result of the rule in Duke v. Robson be avoided? (9.30)

(iii) Should the "enforceable events" we propose in paragraph 9.32 be overriding or variable (cf para. 9.6)? (9.32)

(iv) Should additional protection against enforcement be given to all mortgagors or only to those in the protected class? (9.35)

(v) Should there be an enforcement notice procedure for mortgages within the protected class? How could such a procedure be made to operate with the maximum benefit to mortgagors and the minimum cost and administrative inconvenience to mortgagees? Comments based on experience of similar procedures under the Consumer Credit Act 1974 and the Conveyancing and Feudal Reform (Scotland) Act 1970 are invited. (9.36-9.37)

(vi) In the case of a mortgage within the protected class, should a mortgagee be required to obtain a court order before exercising any remedy? (9.38)

(vii) Should the court's power to delay or prevent enforcement of protected mortgages include a discretion to require a mortgagee to accept a revised repayment schedule in appropriate cases? What factors should the court take into account when deciding whether to exercise such a discretion? (9.39)

(e) **Consolidation**

Does the doctrine of consolidation continue to serve a useful purpose? If so, in what circumstances is it used? (9.41)

(f) **Transfer of the equity of redemption**

Is any change necessary in the present law? (9.43)

(g) **Transfer of the mortgagee's interest**

Should mortgagees remain free to transfer their interest in mortgaged property without the consent of the mortgagor? If not, what is the best method of regulating transfers in practice? (9.44)

(h) **Discharge**

Is there any reason why a single prescribed form of receipt could not be used to discharge all mortgages in registered and unregistered land? (9.45)

10.6 **Effect on other areas of law** Non-consensual security interests in land and floating charges are outside the scope of this Working Paper and we believe their protection and enforcement will not be affected by any of the proposals we make. Are there any problems we have overlooked? (2.5 and 5.47)

APPENDIX A

In this appendix we reproduce a Standard Form of Mortgage Deed which has recently been agreed by the Legal Departments of seven leading building societies. We understand that those involved in this initiative (Abbey National, Alliance & Leicester, Halifax, Leeds Permanent, National & Provincial, Nationwide and Woolwich) hope to bring the Deed into use in the near future, although the adoption of the Deed will involve greater changes for some societies than for others. The Deed has been designed for use with teletex or a similar communication facility.

MORTGAGE DEED

Account Number:	Date:
Society:	HMLR Code: CHFAD*
Mortgage Conditions:	
Borrower:	
Property:	
	Title No.:

1. This Mortgage incorporates the Mortgage Conditions a copy of which has been received by the Borrower.

2. The Borrower as beneficial owner charges the Property by way of legal mortgage with the payment of all moneys payable by the Borrower to the Society.

3. This Mortgage is made for securing further advances.

Signed sealed and delivered by the Borrower in the presence of the Witness.

Borrower	Seal	Witness (signature, name and address)
	L.S.	
	L.S.	
	L.S.	

* The "HMLR Code" identifies the society from the point of view of the Land Registry. If the letters "CHFAD" are added to the code, this indicates to the Land Registry that the mortgage is made for securing further advances.

APPENDIX B

Extract from the Report of the Committee on Conveyancing Legislation and Practice ("the Halliday Committee"), (1966) Cmnd. 3118 pp. 50-52.

The Conveyancing and Feudal Reform (Scotland) Act 1970:

Part II - The Standard Security (sections 9 - 32)

Schedule III - The Standard Conditions

Part II

New Statutory Security

Creation of new form of heritable security

119. The carrying out of the reforms recommended in Part I of this Chapter would not, in our opinion, avoid the need to create an entirely new form of heritable security which would supersede all existing forms. The failure to achieve a satisfactory true heritable security and the consequential widespread use of the ex facie absolute disposition have resulted largely from two long-established rules of law, the one imposed by statute and the other arising under common law, namely (1) the provision of the Act 1696 cap. 5, the Bankruptcy Act, which invalidates securities for debts contracted after the infeftment, and (2) the requirement of the common law that a real burden for money must be specific. The provision of the Act of 1696 was designed to prevent the creation of a fraudulent preference over a bankrupt's heritable property but we consider that the law of bankruptcy itself provides sufficient safeguards in that respect. We also consider that the requirement of specification of precise amount as a condition of an effective real burden is unduly stringent and often quite unsuited to modern conditions. In any event, the general use of the ex facie absolute disposition, to which we have already referred, has for many years permitted both rules to be evaded without serious prejudice, and so far as we are aware no comparable restrictions exist in England. We therefore consider that these restrictive rules should, in the one case, be abolished and, in the other, further modified so that the way may be opened for a new, flexible security.

120. If these suggested amendments to substantive law are made we consider it practicable to devise a new form of heritable security which could be adapted for use for all kinds of advances on the security of heritable property. We were informed by the Law Society of Scotland that the introduction of a standard form of security deed which would replace the existing forms "would be a most valuable reform". We suggest that the principal characteristics of the new security (which for convenience we call the Statutory Security) should be:

(1) In form it should be a security document, containing a conveyance of heritable property in security.

(2) It should be applicable to all kinds of advances, whether fixed or fluctuating, and whether made before, at, or after infeftment in the security subjects.

(3) The rights and obligations of the parties would in general be similar to those which are normally provided conventionally in transactions at present effected by the ex facie absolute disposition and agreement.

(4) The form of the Statutory Security should be prescribed and there should be implied by statute, without the need of express provision, the terms of the security contract as to (a) the personal obligation, (b) the conveyance in security, (c) the management, maintenance and insurance of the property, observance of conditions of title and requirements of public authorities and payment of all proper charges, (d) calling up by the lender, (e) the rights of the lender upon default by the borrower, including power to sell publicly or privately and to foreclose, and (f) the borrower's right of redemption.

(5) The parties should be free to omit, vary, or add to most of the provisions implied by statute, such omissions, variations or additions being specified in a schedule annexed to the security deed.

121. We have examined the styles of agreement at present used by local authorities, banks, building societies and other lenders in relation to heritably secured advances. The provisions which they contain with regard to the matters specified in paragraph 120 are generally to the same effect with minor variations in individual cases. We consider that it would be practicable, after consultation with the parties principally concerned, to adjust a form of Statutory Security and to prescribe by statute standard conditions with regard to those matters which would be of general application and acceptable to both lenders and borrowers. In order to make the Statutory Security universally applicable it would, as already mentioned, be open to the parties to omit or vary the standard conditions or to add any further conditions required by the circumstances of the transaction or the special requirements of the parties. It should not be permissible, however, to contract out of the judicial process required for foreclosure.

122. The principal advantages of the Statutory Security would be:

(1) Only one deed would be required and it would constitute a true security.

(2) The deed would be briefer than the documents at present required for constitution of a security by ex facie absolute disposition and agreement.

(3) It would be practicable for institutional lenders to print a form of Statutory Security with appropriate blank spaces for completion.

(4) The nature of the transaction and the terms of the conveyance in security would, so far as not prescribed by statute, be disclosed on the Register of Sasines.

123. We appreciate that the introduction of the Statutory Security would require to be preceded by consultations with representatives of the professional bodies and commercial interests most likely to be affected by that proposal. It would not have been appropriate for us to enter into such consultations but we received some support for the reform which we propose.

124. While our proposals are put forward on the understanding that further consultations will be necessary, we have shown in Part II of Appendix F suggestions as to the styles of deeds and standard conditions which we contemplate, with observations on their use in practice. This will enable the practicability of our proposals to be considered.

125. In order to achieve so far as possible uniformity and simplicity in conveyancing practice we consider that if the new form of heritable security is introduced it should no longer be possible to create a heritable security in any other way. Existing securities would remain enforceable but all future securities would require to be in the new form.

WE RECOMMEND:

(1) That the provision of the Bankruptcy Act 1696 which invalidates securities for debts contracted after infeftment should be repealed.

(2) That the rule that a real burden for money must be stated precisely should be modified to permit the creation of a new heritable security to cover future advances up to a specified maximum amount.

(3) That a new form of heritable security, sufficiently flexible to be used for all kinds of advances, should be adjusted after consultation with the Law Society of Scotland, local authorities, banks, building societies and other parties specially interested.

(4) That there should be prescribed by statute the style of deed constituting the new security and standard conditions which would, subject to the right of variation by agreement aftermentioned, be applicable to all transactions involving advances on heritable security.

(5) That it should be competent to omit, vary or add to most of the standard conditions by specification in a schedule attached to the deed.

(6) That the legislation which prescribes the new form of heritable security should provide that an effective heritable security may competently be created over land in Scotland only by a deed in that form, and that, without prejudice to the effect of any securities then existing, any conveyance of land intended to operate by way of security for money would not have effect as a conveyance in security or otherwise and that the granter would be entitled to require a reconveyance without prejudice to any personal obligation for repayment of the money advanced.

Part II

The Standard Security

9. - (1) The provisions of this Part of this Act shall have effect for the purpose of enabling a new form of heritable security to be created to be known as a standard security.

(2) It shall be competent to grant and record in the Register of Sasines a standard security over any interest in land to be expressed in conformity with one of the forms prescribed in Schedule 2 to this Act.

(3) A grant of any right over an interest in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security.

(4) Where for the purpose last-mentioned any deed which is not in the form of a standard security contains a disposition or assignation of an interest in land, it shall to that extent be void and unenforceable, and where that deed has been duly recorded the creditor in the purported security may be required, by any person having an interest, to grant any deed which may be appropriate to clear the Register of Sasines of that security.

(5) A standard security may be used for any other purpose for which a heritable security may be used if any of the said forms is appropriate to that purpose, and for the purpose of any enactment affecting heritable securities a standard security, if so used, or if used as is required by this Act instead of a heritable security as defined therein, shall be a heritable security for the purposes of that enactment.

(6) The Bankruptcy Act 1696, in so far as it renders a heritable security of no effect in relation to a debt contracted after the recording of that security, and any rule of law which requires that a real burden for money may only be created in respect of a sum specified in the deed of creation, shall not apply in relation to a standard security.

(7) The provisions of this section shall not affect the operation of the Small Dwellings Acquisition (Scotland) Acts 1899 to 1923, except that in section 11(8) of the Small Dwellings Acquisition Act 1899, in the substitution for section 2(e) of that Act, after the words "other security" there shall be inserted the words "not being a security constituted by an ex facie absolute disposition or assignation, whether qualified by a back letter or not".

(8) For the purposes of this Part of this Act -

(a) "heritable security (except in subsection (5) of this section if the context otherwise requires) means any security capable of being constituted over any interest in land by disposition or assignation of that interest in security of any debt and of being recorded in the Register of Sasines;

(b) "interest in land" means any estate or interest in land, other than an entailed estate or any interest therein, which is capable of being owned or held as a separate interest and to which a title may be recorded in the Register of Sasines;

(c) "debt" means any obligation due, or which will or may become due, to repay or pay money, including any such obligation arising from a transaction or part of a transaction in the course of any trade, business or profession, and any obligation to pay an annuity or ad factum praestandum, but does not include an obligation to pay any feuduty, ground annual, rent or other periodical sum payable in respect of land, and "creditor" and "debtor", in relation to a standard security, shall be construed accordingly.

10. - (1) The import of the clause relating to the personal obligation contained in Form A of Schedule 2 to this Act expressed in any standard security shall, unless specially qualified, be as follows -

(a) where the security is for a fixed amount advanced or payable at, or prior to, the delivery of the deed, the clause undertaking to make payment to the creditor shall import an acknowledgment of receipt by the debtor of the principal sum advanced or an acknowledgment by the debtor of liability to pay that sum and a personal obligation undertaken by the debtor to repay or pay to the creditor on demand in writing at any time after the date of delivery of the standard security the said sum, with interest at the rate stated payable on the dates specified, together with all expenses for which the debtor is liable by virtue of the deed or of this Part of this Act;

(b) where the security is for a fluctuating amount, whether subject to a maximum amount or not and whether advanced or due partly before and partly after delivery of the deed or whether to be advanced or to become due wholly after such delivery, the clause undertaking to make payment to the creditor shall import a personal obligation by the debtor to repay or pay to the creditor on demand in writing the amount, not being greater than the maximum amount, if any, specified in the deed, advanced or due and outstanding at the time of demand, with interest on each advance from the date when it was made until repayment thereof, or on each sum payable from the date on which it became due until payment thereof, and at the rate stated payable on the dates specified, together with all expenses for which the debtor is liable by virtue of the deed or of this Part of this Act.

(2) The clause of warrandice in the forms of standard security contained in Schedule 2 to this Act expressed in any standard security shall, unless specially qualified, import absolute warrandice as regards the interest in land over which the security is granted and the title deeds thereof, and warrandice from fact and deed as regards the rents thereof.

(3) The clause relating to consent to registration for execution contained in Form A of Schedule 2 to this Act expressed in any standard security shall, unless specially qualified, import a consent to registration in the Books of Council and Session, or, as the case may be, in the books of the appropriate sheriff court, for execution.

(4) The forms of standard security contained in Schedule 2 to this Act shall, unless specially qualified, import an assignation to the creditor of the title deeds, including searches, and all conveyances not duly recorded, affecting the security subjects or any part thereof, with power to the creditor in the event of a sale under the powers conferred by the security, but subject to the rights of any person holding prior rights to possession of those title deeds, to deliver them, so far as in the creditor's possession, to the purchaser, and to assign to the purchaser any right he may possess to have the title deeds made forthcoming.

11. - (1) Where a standard security is duly recorded, it shall operate to vest the interest over which it is granted in the grantee as a security for the performance of the contract to which the security relates.

(2) Subject to the provisions of this Part of this Act, the conditions set out in Schedule 3 to this Act, either as so set out or with such variations as have been agreed by the parties in the exercise of the powers conferred by the said Part (which conditions are hereinafter in this Act referred to as "the standard conditions"), shall regulate every standard security.

(3) Subject to the provisions of this Part of this Act, the creditor and debtor in a standard security may vary any of the standard conditions, other than [standard condition 11 (procedure on redemption) and] the provisions of Schedule 3 to this Act relating to the powers of sale, ... and foreclosure and to the exercise of those powers, but no condition capable of being varied shall be varied in a manner inconsistent with any condition which may not be varied by virtue of this subsection.

(4) In this Part of this Act -

(a) any reference to a variation of the standard conditions shall include a reference to the inclusion of an additional condition and to the exclusion of a standard condition;

(b) any purported variation of a standard condition which contravenes the provisions of subsection (3) of this section shall be void and unenforceable.

12. - (1) Notwithstanding any rule of law, a standard security may be granted over an interest in land by a person having right to that interest, but whose title thereto has not been completed by being duly recorded, if in the deed expressing that security the grantor deduces his title to that interest from the person who appears in the Register of Sasines as having the last recorded title thereto.

(2) A deduction of title in a deed for the purposes of the foregoing subsection shall be expressed in the form prescribed by Note 2 or 3 of Schedule 2 to this Act, and on such a deed being recorded as aforesaid the

title of the grantee shall, for the purposes of the rights and obligations between the grantor and the grantee thereof and those deriving right from them, but for no other purpose, in all respects be of the same effect as if the title of the grantor of the deed to the interest to which he has deduced title therein had been duly completed; and any references to a proprietor or to a person last infeft shall in this Part of this Act be construed accordingly.

(3) There may be specified for the purposes of any deduction of title in pursuance of any provision of this Part of this Act any writing which it is competent to specify as a title, midcouple, or link in title for the purposes of section 5 of the Conveyancing (Scotland) Act 1924 (deduction of title).

13. - (1) Where the creditor in a standard security duly recorded has received notice of the creation of a subsequent security over the same interest in land or any part thereof, or of the subsequent assignation or conveyance of that interest in whole or in part, being a security, assignation or conveyance so recorded, the preference in ranking of the security of that creditor shall be restricted to security for his present advances and future advances which he may be required to make under the contract to which the security relates and interest present or future due thereon (including any such interest which has accrued or may accrue) and for any expenses or outlays (including interest thereon) which may be, or may have been, reasonably incurred in the exercise of any power conferred on any creditor by the deed expressing the existing security.

(2) For the purposes of the foregoing subsection -

(a) a creditor in an existing standard security duly recorded shall not be held to have had any notice referred to in that subsection, by reason only of the subsequent recording of the relevant deed in the Register of Sasines;

(b) any assignation, conveyance or vesting in favour of or in any other person of the interest of the debtor in the security subjects or in any part thereof resulting from any judicial decree, or otherwise by operation of law, shall constitute sufficient notice thereof to the creditor.

(3) Nothing in the foregoing provisions of this section shall affect

(a) any preference in ranking enjoyed by the Crown; and

(b) any powers of the creditor and debtor in any heritable security to regulate the preference to be enjoyed by creditors in such manner as they may think fit.

14. - (1) Any standard security duly recorded may be transferred, in whole or in part, by the creditor by an assignation in conformity with Form A or B of Schedule 4 to this Act, and upon such an assignation being duly recorded, the security, or, as the case may be, part thereof, shall be vested in the assignee as effectually as if the security or the part had been granted in his favour.

(2) An assignation of a standard security shall, except so far as otherwise therein stated, be deemed to convey to the grantee all rights competent to the grantor to the writs, and shall have the effect inter alia of vesting in the assignee -

(a) the full benefit of all corroborative or substitutional obligations for the debt, or any part thereof, whether those obligations are contained in any deed or arise by operation of law or otherwise.

(b) the right to recover payment from the debtor of all expenses properly incurred by the creditor in connection with the security, and

(c) the entitlement to the benefit of any notices served and of all procedure instituted by the creditor in respect of the security to the effect that the grantee may proceed as if he had originally served or instituted such notices or procedure.

15. - (1) The security constituted by any standard security duly recorded may be restricted, as regards any part of the interest in land burdened by the security, by a deed of restriction in conformity with Form C of Schedule 4 to this Act, and, upon that deed being duly recorded, the security shall be restricted to the interest in land contained in the standard security other than the part of that interest disburdened by the deed; and the interest in land thereby disburdened shall be released from the security wholly or to the extent specified in the deed.

(2) A partial discharge and deed of restriction of a standard security, which has been duly recorded, may be combined in one deed, which shall be in conformity with Form D of the said Schedule 4.

16. - (1) Any alteration in the provisions (including any standard condition) of a standard security duly recorded, other than an alteration which may appropriately be effected by an assignation, discharge or restriction of that standard security, or an alteration which involves an addition to, or an extension of, the interest in land mentioned therein, may be effected by a variation endorsed on the standard security in conformity with Form E of Schedule 4 to this Act, or by a variation contained in a separate deed in a form appropriate for that purpose, duly recorded in either case.

(2) Where a standard security has been duly recorded, but the personal obligation or any other provision (including any standard condition) relating to the security has been created or specified in a deed which has not been so recorded, nothing contained in this section shall prevent any alteration in that personal obligation or provision, other than an alteration which may be appropriately effected by an assignation, discharge or restriction of the standard security, or an alteration which involves an addition to, or an extension of, the interest in land mentioned therein, by a variation contained in any form of deed appropriate for that purpose, and such a variation shall not require to be recorded in the Register of Sasines.

(3) .....

(4) Any variation effected in accordance with this section shall not prejudice any other security or right over the same interest in land, or any part thereof, effectively constituted before the variation is recorded, or, where the variation is effected by an unrecorded deed, before that deed is executed, as the case may be.

17. A standard security duly recorded may be discharged, and the interest in land burdened by that security may be disburdened thereof, in whole or in part, by a discharge in conformity with Form F of Schedule 4 to this Act, duly recorded.

18. - (1) [Subject to the provisions of subsection (1A) of this section,] The debtor in a standard security or, where the debtor is not the proprietor, the proprietor of the security subjects shall be entitled to redeem the security [on giving two months' notice of his intention so to do, and] in conformity with the terms of standard condition 11 and the appropriate Forms of Schedule 5 to this Act.

[(1A) The provisions of the foregoing subsection shall be subject to any agreement to the contrary, but any right to redeem the security shall be exercisable in conformity with the terms and Forms referred to in that subsection.]

(2) Where owing to the death or absence of the creditor, or to any other cause, the debtor in a standard security or, as the case may be, the proprietor of the security subjects [(being in either case a person entitled to redeem the security)] is unable to obtain a discharge under the [foregoing provisions of this section] may -

(a) where the security was granted in respect of any obligation to repay or pay money, consign in any bank in Scotland, incorporated by or under Act of Parliament or by Royal Charter, the whole amount due to the creditor on redemption, other than any unascertained expenses of the creditor, for the person appearing to have the best right thereto, and

(b) in any other case, apply to the court for declarator that the whole obligations under the contract to which the security relates have been performed.

(3) On consignation, or on the court granting declarator as aforesaid, a certificate to that effect may be expede by a solicitor in the appropriate form prescribed by Form D of Schedule 5 to this Act, which on being duly recorded shall disburden the interest in land, to which the standard security relates, of that security.

(4) For the purposes of this section, "whole amount due" means the debt to which the security relates, so far as outstanding, and any other sums due thereunder by way of interest or otherwise.

19. - (1) Where a creditor in a standard security intends to require discharge of the debt thereby secured and, failing that discharge, to

exercise any power conferred by the security to sell any subjects of the security or any other power which he may appropriately exercise on the default of the debtor within the meaning of standard condition 9(1)(a), he shall serve a notice calling-up the security in conformity with Form A of Schedule 6 to this Act (hereinafter in this Act referred to as a "calling-up notice"), in accordance with the following provisions of this section.

(2) Subject to the following provisions of this section, a calling-up notice shall be served on the person last infeft in the security subjects and appearing on the record as the proprietor, and should the proprietor of those subjects, or any part thereof, be dead then on his representative or the person entitled to the subjects in terms of the last recorded title thereto, notwithstanding any alteration of the succession not appearing in the Register of Sasines.

(3) Where the person last infeft in the security subjects was an incorporated company which has been removed from the Register of Companies, or a person deceased who has left no representatives, a calling-up notice shall be served on the Lord Advocate and, where the estates of the person last infeft have been sequestrated under the Bankruptcy (Scotland) Act 1913, the notice shall be served on the trustee in the sequestration (unless such trustee has been discharged) as well as on the bankrupt.

(4) If the proprietor be a body of trustees, it shall be sufficient if the notice is served on a majority of the trustees infeft in the security subjects.

(5) It shall be an obligation on the creditor to serve a copy of the calling-up notice on any other person against whom he wishes to preserve any right of recourse in respect of the debt.

(6) For the purposes of the foregoing provisions of this section, the service of a calling-up notice may be made by delivery to the person on whom it is desired to be served or the notice may be sent by registered post or by the recorded delivery service to him at his last known address, or, in the case of the Lord Advocate, at the Crown Office, Edinburgh, and an acknowledgment, signed by the person on whom service has been made, in conformity with Form C of Schedule 6 to this Act, or, as the case may be, a certificate in conformity with Form D of that Schedule, accompanied by the postal receipt shall be sufficient evidence of the service of that notice; and if the address of the person on whom the notice is desired to be served is not known, or if it is not known whether that person is still alive, or if the packet containing a calling-up notice is returned to the creditor with an intimation that it could not be delivered, that notice shall be sent to the Extractor of the Court of Session, and shall be equivalent to the service of a calling-up notice on the person on whom it is desired to be served.

(7) For the purposes of the last foregoing subsection, an acknowledgment of receipt by the said Extractor on a copy of a calling-up notice shall be sufficient evidence of the receipt by him of that notice.

(8) A calling-up notice served by post shall be held to have been served on the next day after the day of posting.

(9) Where a creditor in a standard security has indicated in a calling-up notice that any sum and any interest thereon due under the contract may be subject to adjustment in amount, he shall, if the person on whom notice has been served so requests, furnish the debtor with a statement of the amount as finally determined within a period of one month from the date of service of the caling-up notice, and a failure by the creditor to comply with the provisions of this subsection shall cause the calling-up notice to be of no effect.

(10) The period of notice mentioned in the calling-up notice may be effectively dispensed with or shortened by the person on whom it is served, with the consent of the creditors, if any, holding securities pari passu with, or postponed to, the security held by the creditor serving the calling-up notice, by a minute written or endorsed upon the said notice, or a copy thereof, in conformity with Form C of Schedule 6 to this Act.

(11) A calling-up notice shall cease to have effect for the purpose of a sale in the exercise of any power conferred by the security on the expiration of a period of five years, which period shall run -

(a) in the case where the subjects of the security, or any part thereof, have not been offered for or exposed to sale, from the date of the notice,

(b) in the case where there has been such an offer or exposure, from the date of the last offer or exposure.

20. - (1) Where the debtor in a standard security is in default within the meaning of standard condition 9(1)(a), the creditor may exercise such of his rights under the security as he may consider appropriate, and any such right shall be in addition to and not in derogation from any other remedy arising from the contract to which the security relates or from any right conferred by any enactment or by any rule of law on the creditor in a heritable security.

(2) Where the debtor is in default as aforesaid, the creditor shall have the right to sell the security subjects, or any part thereof, in accordance with the provisions of this Part of this Act.

(3) A creditor in a standard security who is in lawful possession of the security subjects may let the security subjects, or any part thereof, for any period not exceeding seven years, or may make application to the court for warrant to let those subjects, or any part thereof, for a period exceeding seven years, and the application shall state the proposed tenant, and the duration and conditions of the proposed lease, and shall be served on the proprietor of the subjects and on any other heritable creditor having interest as such a creditor in the subjects.

(4) The court, on such an application as aforesaid and after such inquiry and such further intimation of the application as it may think fit, may grant the application as submitted, or subject to such variation as it may consider reasonable in all the circumstances of the case, or may refuse the application.

(5) There shall be deemed to be assigned to a creditor who is in lawful possession of the security subjects all rights and obligations of the proprietor relating to -

(a) leases, or any permission or right of occupancy, granted in respect of those subjects or any part thereof, and

(b) the management and maintenance of the subjects and the effecting of any reconstruction, alteration or improvement reasonably required for the purpose of maintaining the market value of the subjects.

21. - (1) Where the debtor in a standard security is in default within the meaning of standard condition 9(1)(b), and the default is remediable, the creditor may, without prejudice to any other powers he may have by virtue of this Act or otherwise, proceed in accordance with the provisions of this section to call on the debtor and on the proprietor, where he is not the debtor, to purge the default.

(2) For the aforesaid purpose the creditor may serve on the debtor and, as the case may be, on the proprietor a notice in conformity with Form B of Schedule 6 to this Act (hereinafter in this Act referred to as a "notice of default") which shall be served in the like manner and with the like requirements as to proof of service as a calling-up notice.

(3) For the purpose of dispensing with, or shortening, the period of notice mentioned in a notice of default, section 19(10) of this Act shall apply as it applies in relation to a calling-up notice.

(4) Notwithstanding the failure to comply with any requirement contained in the notice, a notice of default shall cease to be authority for the exercise of the rights mentioned in section 23(2) of this Act on the expiration of a period of five years from the date of the notice.

22. - (1) Where a person on whom a notice of default has been served considers himself aggrieved by any requirement of that notice he may, within a period of fourteen days of the service of the notice, object to the notice by way of application to the court; and the applicant shall, not later than the lodging of that application, serve a copy of his application on the creditor, and on any other party on whom the notice has been served by the creditor.

(2) On any such application the court, after hearing the parties and making such inquiry as it may think fit, may order the notice appealed against to be set aside, in whole or in part, or otherwise to be varied, or to be upheld.

(3) The respondent in any such application may make a counter-application craving for any of the remedies conferred on him by this Act or by any other enactment relating to heritable securities, and the court may grant any such remedy as aforesaid as it may think proper.

(4) For the purposes of such a counter-application as aforesaid, a certificate which conforms with the requirements of Schedule 7 to this Act may be lodged in court by the creditor, and that certificate shall be

prima facie evidence of the facts directed by the said Schedule to be contained therein.

23. - (1) Where a person does not object to a notice of default in accordance with the provisions of the last foregoing section, or where he has so objected and the notice has been upheld or varied under that section, it shall be his duty to comply with any requirement, due to be performed or fulfilled by him, contained in the notice or, as the case may be, in the notice as so varied.

(2) Subject to the provisions of section 21(4) of this Act, where a person fails to comply as aforesaid, the creditor, subject to the next following subsection, may proceed to exercise such of his rights on default under standard condition 10(2), (6) and (7) as he may consider appropriate.

(3) At any time after the expiry of the period stated in a notice of default, or in a notice varied as aforesaid, but before the conclusion of any enforceable contract to sell the security subjects, or any part thereof, by virtue of the last foregoing subsection, the debtor or proprietor [(being in either case a person entitled to redeem the security)] may, subject to any agreement to the contrary, redeem the security without the necessity of observance of any requirement as to notice.

24. - (1) Without prejudice to his proceedings by way of notice of default in respect of a default within the meaning of standard condition 9(1)(b), a creditor in a standard security, where the debtor is in default within the meaning of that standard condition or standard condition 9(1)(c), may apply to the court for warrant to exercise any of the remedies which he is entitled to exercise on a default within the meaning of standard condition 9(1)(a).

(2) For the purposes of such an application as aforesaid in respect of a default within the meaning of standard condition 9(1)(b), a certificate which conforms with the requirements of Schedule 7 to this Act may be lodged in court by the creditor, and that certificate shall be prima facie evidence of the facts directed by the said Schedule to be contained therein.

25. A creditor in a standard security having right to sell the security subjects may exercise that right either by private bargain or by exposure to sale, and in either event it shall be the duty of the creditor to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained.

26. - (1) Where a creditor in a standard security has effected a sale of the security subjects, or any part thereof, and grants to the purchaser or his nominee a disposition of the subjects sold thereby, which bears to be in implement of the sale, then, on that disposition being duly recorded, those subjects shall be disburdened of the standard security and of all other heritable securities and diligences ranking pari passu with, or postponed to that security.

(2) Where on a sale as aforesaid the security subjects remain subject to a prior security, the recording of a disposition under the

foregoing subsection shall not affect the rights of the creditor in that security, but the creditor who has effected the sale shall have the like right as the debtor to redeem the security.

27. - (1) The money which is received by the creditor in a standard security, arising from any sale by him of the security subjects, shall be held by him in trust to be applied by him in accordance with the following order of priority -

(a) first, in payment of all expenses properly incurred by him in connection with the sale, or any attempted sale;

(b) secondly, in payment of the whole amount due under any prior security to which the sale is not made subject;

(c) thirdly, in payment of the whole amount due under the standard security, and in payment, in due proportion, of the whole amount due under a security, if any, ranking pari passu with his own security, which has been duly recorded;

(d) fourthly, in payment of any amounts due under any securities with a ranking postponed to that of his own security, according to their ranking,

and any residue of the money so received shall be paid to the person entitled to the security subjects at the time of sale, or to any person authorised to give receipts for the proceeds of the sale thereof.

(2) Where owing to the death or absence of any other creditor, or to any other cause, a creditor is unable to obtain a receipt or discharge for any payment he is required to make under the provisions of the foregoing subsection, he may, without prejudice to his liability to account therefor, consign the amount due (so far as ascertainable) in the sheriff court for the person appearing to have the best right thereto; and where consignation is so made, the creditor shall lodge in court a statement of the amount consigned.

(3) A consignation made in pursuance of the last foregoing subsection shall operate as a discharge of the payment of the amount due, and a certificate under the hand of the sheriff clerk shall be sufficient evidence thereof.

28. - (1) Where the creditor in a standard security has exposed the security subjects to sale at a price not exceeding the amount due under the security and under any security ranking prior to, or pari passu with, the security, and has failed to find a purchaser, or where, having so failed, he has succeeded in selling only a part of the subjects at a price which is less than the amount due as aforesaid, he may, on the expiration of a period of two months from the date of the first exposure to sale, apply to the court for a decree of foreclosure.

(2) In any application under the last foregoing subsection the creditor shall lodge a statement setting out the whole amount due under the security but, without prejudice to the right of the debtor or of the

proprietor to challenge that statement, it shall be sufficient for the purposes of the application for the creditor to establish to the satisfaction of the court that the amount so stated is not less than the price at which the security subjects have been exposed to sale or sold, where part of the subjects has been sold as aforesaid.

(3) Any application under subsection (1) of this section shall be served on the debtor in the standard security, the proprietor of the security subjects (if he is a person other than the debtor) and the creditor in any other heritable security affecting the security subjects as disclosed by a search of the Register of Sasines for a period of twenty years immediately preceding the last date to which the appropriate Minute Book of the said Register has been completed at the time when the application is made.

(4) The court may order such intimation and inquiry as it thinks fit and may in its discretion allow the debtor or the proprietor of the security subjects a period not exceeding three months in which to pay the whole amount due under the security and, subject to any such allowance, may -

(a) appoint the security subjects or the unsold part thereof to be re-exposed to sale at a price to be fixed by the court, in which event the creditor in the security may bid and purchase at the sale, or

(b) grant a decree of foreclosure in conformity with the provisions of the next following subsection.

(5) A decree of foreclosure shall contain a declaration that on the extract of the decree being duly recorded, [any right to redeem the security] has been extinguished and that the creditor has right to the security subjects or the unsold part thereof, described by means of a particular description or by reference to a description thereof as in Schedule D to the Conveyancing (Scotland) Act 1924 or in Schedule G to the Titles to Land Consolidation (Scotland) Act 1868, including a reference to any conditions or clauses affecting the subjects or the unsold part thereof, at the price at which the said subjects were last exposed to sale under deduction of the price received for any part thereof sold, and shall also contain a warrant for recording the extract of the decree in the Register of Sasines.

(6) Upon an extract of the decree of foreclosure being duly recorded, the following provisions of this subsection shall have effect in relation to the security subjects to which the decree relates -

(a) [any right to redeem the security] shall be extinguished, and the creditor shall have right to, and be vested in, the subjects as if he had received an irredeemable disposition thereof duly recorded from the proprietor of the subjects at the date of the recording of the extract of the decree;

(b) the subjects shall be disburdened of the standard security and all securities and diligences postponed thereto;

(c) the creditor who has obtained the decree shall have the like right as the debtor to redeem any security prior to, or pari passu with, his own security.

(7) Notwithstanding the due recording of an extract of a decree of foreclosure, any personal obligation of the debtor under the standard security shall remain in full force and effect so far as not extinguished by the price at which the security subjects have been acquired and the price for which any part thereof has been sold.

(8) Where the security subjects or any part thereof have been acquired by a creditor in the security by virtue of a decree of foreclosure under the provisions of this section, the title thereto of the creditor shall not be challengeable on the ground of any irregularity in the proceedings for foreclosure or on calling-up or default which preceded it; but nothing in the provisions of this subsection shall affect the competency of any claim for damages in respect of such proceedings against the creditor.

29. - (1) The court for the purposes of this Part of this Act, and for the operation of section 11 of the Heritable Securities (Scotland) Act 1894 (application by pari passu creditor to sell), in relation to a standard security, shall be the sheriff having jurisdiction over any part of the security subjects, and the sheriff shall be deemed to have such jurisdiction whatever the value of the subjects.

(2) Any application, or counter-application to the court under this Part of this Act shall be by way of summary application.

(3) An interlocutor of the sheriff disposing of any cause under this Part of this Act shall be final, except as to a question of title.

30. - (1) In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

"creditor" and "debtor" shall include any successor in title, assignee or representative of a creditor or debtor;

"debt" and "creditor" and "debtor", in relation to a standard security, have the meanings assigned to them by section 9(8) of this Act;

"duly recorded" means recorded in the appropriate division of the General Register of Sasines;

"exposure to sale" means exposure to sale by public roup, and exposed or re-exposed to sale shall be construed accordingly;

"heritable security" has the meaning assigned to it by the said section 9(8);

"interest in land" has the meaning assigned to it by the said section 9(8);

"Register of Sasines" means the appropriate division of the General Register of Sasines;

"the standard conditions" are the conditions (whether varied or not) referred to in section 11(2) of this Act;

"whole amount due" has the meaning assigned to it by section 18(4) of this Act.

(2) For the purpose of construing this Part of this Act in relation to the creation of a security over a registered lease and to any subsequent transactions connected with that security, the following expressions shall have the meanings hereby respectively assigned to them, that is to say -

"conveyance" or "disposition" means assignation;

"convey" or "dispone" means assign;

"infeft" means having a recorded title;

"proprietor" means lessee;

"security subjects" means a registered lease subject to a security.

31. Nothing in the provisions of this Part of this Act shall affect the validity of any heritable security within the meaning of this Part which has been duly recorded before the commencement of this Act, and any such security may be dealt with, and shall be as capable of being enforced, as if this Part had not been passed.

32. The provisions of any enactment relating to a bond and disposition or assignation in security shall apply to a standard security, except in so far as such provisions are inconsistent with the provisions of this Part of this Act, but, without prejudice to the generality of that exception, the enactments specified in Schedule 8 to this Act shall not so apply.

SCHEDULE 3

THE STANDARD CONDITIONS

1. It shall be an obligation on the debtor -

   (a) to maintain the security subjects in good and sufficient repair to the reasonable satisfaction of the creditor;

   (b) to permit, after seven clear days notice in writing, the creditor or his agent to enter upon the security subjects at all reasonable times to examine the condition thereof;

   (c) to make all necessary repairs and make good all defects in pursuance of his obligation under head (a) of this condition within such reasonable period as the creditor may require by notice in writing.

2. It shall be an obligation on the debtor -

   (a) to complete, as soon as may be practicable, any unfinished buildings and works forming part of the security subjects to the reasonable satisfaction of the creditor;

   (b) not to demolish, alter or add to any buildings or works forming part of the security subjects, except in accordance with the terms of a prior written consent of the creditor and in compliance with any consent, licence or approval required by law;

   (c) to exhibit to the creditor at his request evidence of that consent, licence or approval.

3. It shall be an obligation on the debtor -

   (a) to observe any condition or perform any obligation in respect of the security subjects lawfully binding on him in relation to the security subjects;

   (b) to make due and punctual payment of any ground burden, teind, stipend, or standard charge, and any rates, taxes and other public burdens, and any other payments exigible in respect of the security subjects;

   (c) to comply with any requirement imposed upon him in relation to the security subjects by virtue of any enactment.

4. It shall be an obligation on the debtor -

   (a) where he has received any notice or order, issued or made by virtue of the Town and Country Planning (Scotland) Acts 1947 to 1969 or any amendment thereof,

or any proposal so made for the making or issuing of any such notice or order, or any other notice or document affecting or likely to affect the security subjects, to give to the creditor, within fourteen days of the receipt of that notice, order or proposal, full particulars thereof;

(b) to take, as soon as practicable, all reasonable or necessary steps to comply with such a notice or order or, as the case may be, duly to object thereto;

(c) in the event of the creditor so requiring, to object or to join with the creditor in objecting to any such notice or order or in making representations against any proposal therefor.

5. It shall be an obligation on the debtor -

(a) to insure the security subjects or, at the option of the creditor, to permit the creditor to insure the security subjects in the names of the creditor and the debtor to the extent of the market value thereof against the risk of fire and such other risks as the creditor may reasonanbly require;

(b) to deposit any policy of insurance effected by the debtor for the aforesaid purpose with the creditor;

(c) to pay any premium due in respect of any such policy, and, where the creditor so requests, to exhibit a receipt therefor not later than the fourteenth day after the renewal date of the policy;

(d) to intimate to the creditor, within fourteen days of the occurrence, any occurrence which may give rise to a claim under the policy, and to authorise the creditor to negotiate the settlement of the claim;

(e) without prejudice to any obligation to the contrary enforceable against him, to comply with any reasonable requirement of the creditor as to the application of any sum received in respect of such a claim;

(f) to refrain from any act or omission which would invalidate the policy.

6. It shall be an obligation on the debtor not to let, or agree to let, the security subjects, or any part thereof, without the prior consent in writing of the creditor, and "to let" in this condition includes to sub-let.

7. - (1) The creditor shall be entitled to perform any obligation imposed by the standard conditions on the debtor, which the debtor has failed to perform.

(2) Where it is necessary for the performance of any obligation as aforesaid, the creditor may, after giving seven clear days notice in

writing to the debtor, enter upon the security subjects at all reasonable times.

(3) All expenses and charges (including any interest thereon), reasonably incurred by the creditor in the exercise of a right conferred by this condition, shall be recoverable from the debtor and shall be deemed to be secured by the security subjects under the standard security, and the rate of any such interest shall be the rate in force at the relevant time in respect of advances secured by the security, or, where no such rate is prescribed, shall be the bank rate in force at the relevant time.

8. The creditor shall be entitled, subject to the terms of the security and to any requirement of law, to call-up a standard security in the manner prescribed by section 19 of this Act.

9. - (1) The debtor shall be held to be in default in any of the following circumstances, that is to say -

(a) where a calling-up notice in respect of the security has been served and has not been complied with;

(b) where there has been a failure to comply with any other requirement arising out of the security;

(c) where the proprietor of the security subjects has become insolvent.

(2) For the purposes of this condition, the proprietor shall be taken to be insolvent if -

(a) he has become notour bankrupt, or he has executed a trust deed for behoof of, or has made a composition contract or arrangement with, his creditors;

(b) he has died and a judicial factor has been appointed under section 163 of the Bankruptcy (Scotland) Act 1913 to divide his insolvent estate among his creditors, or an order has been made for the administration of his estate according to the law of bankruptcy under section 130 of the Bankruptcy Act 1914, or by virtue of an order of the Court his estate is being administered in accordance with the rules set out in Part I Schedule 1 to the Administration of Estates Act 1925;

(c) where the proprietor is a company, a winding-up order has been made with respect to it, or a resolution for voluntary winding-up (other than a members' voluntary winding-up) has been passed with respect to it, or a receiver or manager of its undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

10. - (1) Where the debtor is in default, the creditor may, without prejudice to his exercising any other remedy arising from the contract to which the standard security relates, exercise, in accordance with the provisions of Part II of this Act and of any other enactment applying to standard securities, such of the remedies specified in the following sub-paragraphs of this standard condition as he may consider appropriate.

(2) He may proceed to sell the security subjects or any part thereof.

(3) He may enter into possession of the security subjects and may receive or recover feuduties, ground annuals or, as the case may be, the rents of those subjects or any part thereof.

(4) Where he has entered into possession as aforesaid, he may let the security subjects or any part thereof.

(5) Where he has entered into possession as aforesaid there shall be transferred to him all the rights of the debtor in relation to the granting of leases or rights of occupancy over the security subjects and to the management and maintenance of those subjects.

(6) He may effect all such repairs and may make good such defects as are necessary to maintain the security subjects in good and sufficient repair, and may effect such reconstruction, alteration and improvement on the subjects as would be expected of a prudent proprietor to maintain the market value of the subjects, and for the aforesaid purposes may enter on the subjects at all reasonable times.

(7) He may apply to the court for a decree of foreclosure.

11. - (1) The debtor shall be entitled to exercise his [right (if any) to redeem the security on giving notice] of his intention so to do, being a notice in writing (hereinafter referred to as a "notice of redemption").

(2) Nothing in the provisions of [this Act] shall preclude a creditor from waiving the necessity for a notice of redemption, or from agreeing to a period of notice of less than [that to which he is entitled.]

(3)(a) A notice of redemption may be delivered to the creditor or sent by registered post or recorded delivery to him at his last known address, and an acknowledgment signed by the creditor or his agent or a certificate of postage by the person giving the notice accompanied by the postal receipt shall be sufficient evidence of such notice having been given.

(b) If the address of the creditor is not known, or if the packet containing the notice of redemption is returned to the sender with intimation that it could not be delivered, a notice of redemption may be sent to the Extractor of the Court of Session and an acknowledgment of receipt by him shall be sufficient evidence of such notice having been given.

(c) A notice of redemption sent by post shall be held to have been given on the day next after the day of posting.

(4) When a notice of redemption states that a specified amount will be repaid, and it is subsequently ascertained that the whole amount due to be repaid is more or less than the amount specified in the notice, the notice shall nevertheless be effective as a notice of repayment of the amount due as subsequently ascertained.

(5) [Where the debtor has exercised a right to redeem, and has made payment] of the whole amount due, or [has performed] the whole obligations of the debtor under the contract to which the security relates, the creditor shall grant a discharge in the terms prescribed in section 17 of this Act.

12. The debtor shall be personally liable to the creditor for the whole expenses of the preparation and execution of the standard security and any variation, restriction and discharge thereof and, where any of those deeds are recorded, the recording thereof, and all expenses reasonably incurred by the creditor in calling-up the security and realising or attempting to realise the security subjects, or any part thereof, and exercising any other powers conferred upon him by the security.

Interpretation

In this Schedule, where the debtor is not the proprietor of the security subjects, "debtor" means "proprietor", except

(a) in standard conditions 9(1), 10(1) and 12, and

(b) in standard condition 11, where "debtor" includes the proprietor.

APPENDIX C

The Consumer Credit Act 1974:

Section 76

Sections 87 - 89

Section 98

Sections 137 - 140

The Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 S.I. 1983 No. 1561.

76. - (1) The creditor or owner is not entitled to enforce a term of a regulated agreement by -

(a) demanding earlier payment of any sum, or

(b) recovering possession of any goods or land, or

(c) treating any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred,

except by or after giving the debtor or hirer not less than seven days' notice of his intention to do so.

(2) Subsection (1) applies only where -

(a) a period for the duration of the agreement is specified in the agreement, and

(b) that period has not ended when the creditor or owner does an act mentioned in subsection (1),

but so applies notwithstanding that, under the agreement, any party is entitled to terminate it before the end of the period so specified.

(3) A notice under subsection (1) is ineffective if not in the prescribed form.

(4) Subsection (1) does not prevent a creditor from treating the right to draw on any credit as restricted or deferred and taking such steps as may be necessary to make the restriction or deferment effective.

(5) Regulations may provide that subsection (1) is not to apply to agreements described by the regulations.

(6) Subsection (1) does not apply to a right of enforcement arising by reason of any breach by the debtor or hirer of the regulated agreement.

87. - (1) Service of a notice on the debtor or hirer in accordance with section 88 (a "default notice") is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement, -

(a) to terminate the agreement, or

(b) to demand earlier payment of any sum, or

(c) to recover possession of any goods or land, or

(d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred, or

(e) to enforce any security.

(2) Subsection (1) does not prevent the creditor from treating the right to draw upon any credit as restricted or deferred, and taking such steps as may be necessary to make the restriction or deferment effective.

(3) The doing of an act by which a floating charge becomes fixed is not enforcement of a security.

(4) Regulations may provide that subsection (1) is not to apply to agreements described by the regulations.

88. - (1) The default notice must be in the prescribed form and specify -

(a) the nature of the alleged breach;

(b) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken;

(c) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach, and the date before which it is to be paid.

(2) A date specified under subsection (1) must not be less than seven days after the date of service of the default notice, and the creditor or owner shall not take action such as is mentioned in section 87(1) before the date so specified or (if no requirement is made under subsection (1)) before those seven days have elapsed.

(3) The default notice must not treat as a breach failure to comply with a provision of the agreement which becomes operative only on breach of some other provision, but if the breach of that other provision is not duly remedied or compensation demanded under subsection (1) is not duly paid, or (where no requirement is made under subsection (1)) if the seven days mentioned in subsection (2) have elapsed, the creditor or owner may treat the failure as a breach and section 87(1) shall not apply to it.

(4) The default notice must contain information in the prescribed terms about the consequences of failure to comply with it.

(5) A default notice making a requirement under subsection (1) may include a provision for the taking of action such as is mentioned in section 87(1) at any time after the restriction imposed by subsection (2) will cease, together with a statement that the provision will be ineffective if the breach is duly remedied or the compensation duly paid.

89. If before the date specified for that purpose in the default notice the debtor or hirer takes the action specified under section 88(1)(b) or (c) the breach shall be treated as not having occurred.

98. - (1) The creditor or owner is not entitled to terminate a regulated agreement except by or after giving the debtor or hirer not less than seven days' notice of the termination.

(2) Subsection (1) applies only where -

(a) a period for the duration of the agreement is specified in the agreement, and

(b) that period has not ended when the creditor or owner does an act mentioned in subsection (1),

but so applies notwithstanding that, under the agreement, any party is entitled to terminate it before the end of the period so specified.

(3) A notice under subsection (1) is ineffective if not in the prescribed form.

Extortionate credit bargains

137. - (1) If the court finds a credit bargain extortionate it may reopen the credit agreement so as to do justice between the parties.

(2) In this section and sections 138 to 140, -

(a) "credit agreement" means any agreement between an individual (the "debtor") and any other person (the "creditor") by which the creditor provides the debtor with credit of any amount, and

(b) "credit bargain" -

(i) where no transaction other than the credit agreement is to be taken into account in computing the total charge for credit, means the credit agreement, or

(ii) where one or more other transactions are to be so taken into account, means the credit agreement and those other transactions, taken together.

138. - (1) A credit bargain is extortionate if it -

(a) requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or

(b) otherwise grossly contravenes ordinary principles of fair dealing.

(2) In determining whether a credit bargain is extortionate, regard shall be had to such evidence as is adduced concerning -

(a) interest rates prevailing at the time it was made,

(b) the factors mentioned in subsection (3) to (5), and

(c) any other relevant considerations.

(3) Factors applicable under subsection (2) in relation to the debtor include -

(a) his age, experience, business capacity and state of health; and

(b) the degree to which, at the time of making the credit bargain, he was under financial pressure, and the nature of that pressure.

(4) Factors applicable under subsection (2) in relation to the creditor include -

(a) the degree of risk accepted by him, having regard to the value of any security provided;

(b) his relationship to the debtor; and

(c) whether or not a colourable cash price was quoted for any goods or services included in the credit bargain.

(5) Factors applicable under subsection (2) in relation to a linked transaction include the question how far the transaction was reasonably required for the protection of debtor or creditor, or was in the interest of the debtor.

139. - (1) A credit agreement may, if the court thinks just, be reopened on the ground that the credit bargain is extortionate -

(a) on an application for the purpose made by the debtor or any surety to the High Court, county court or sheriff court; or

(b) at the instance of the debtor or a surety in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the credit agreement, any security relating to it, or any linked transaction; or

(c) at the instance of the debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant.

(2) In reopening the agreement, the court may, for the purpose of relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable, by order -

(a) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons,

(b) set aside the whole or part of any obligation imposed on the debtor or a surety by the credit bargain or any related agreement,

(c) require the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement by the debtor or a surety, whether paid to the creditor or any other person,

(d) direct the return to the surety of any property provided for the purposes of the security, or

(e) alter the terms of the credit agreement or any security instrument.

(3) An order may be made under subsection (2) notwithstanding that its effect is to place a burden on the creditor in respect of an advantage unfairly enjoyed by another person who is a party to a linked transaction.

(4) An order under subsection (2) shall not alter the effect of any judgment.

(5) In England and Wales an application under subsection (1)(a) shall be brought only in the county court in the case of -

(a) a regulated agreement, or

(b) an agreement (not being a regulated agreement) under which the creditor provides the debtor with fixed-sum credit not exceeding [£2,000] or running-account credit on which the credit limit does not exceed [£2,000].

(6) In Scotland an application under subsection (1)(a) may be brought in the sheriff court for the district in which the debtor or surety resides or carries on business.

(7) In Northern Ireland an application under subsection (1)(a) may be brought in the county court in the case of -

(a) a regulated agreement, or

(b) an agreement (not being a regulated agreement) under which the creditor provides the debtor with fixed-sum credit not exceeding [£1,000] or running-account credit on which the credit limit does not exceed [£1,000].

140. Where the credit agreement is not a regulated agreement, expressions used in sections 137 to 139 which, apart from this section, apply only to regulated agreements, shall be construed as nearly as may be as if the credit agreement were a regulated agreement.

The Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 S.I. 1983 No. 1561

1. - (1) These Regulations may be cited as the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 and shall come into operation on 19th May 1985.

(2) In these Regulations, "the Act" means the Consumer Credit Act 1974.

2. - (1) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 76(1) of the Act (which relates to the duty to give notice to the debtor or hirer (non-default cases) before taking certain action to enforce a term of an agreement) shall contain -

(a) a statement that the notice is served under section 76(1) of the Consumer Credit Act 1974;

(b) the information set out in paragraphs 1 to 5 of Schedule 1 to these Regulations; and

(c) statements in the form specified in paragraphs 6 to 8 of that Schedule.

(2) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 87(1) of the Act (which relates to the necessity to serve a default notice on the debtor or hirer in accordance with section 88 before taking certain action by reason of any breach of the agreement by the debtor or hirer) shall contain -

(a) a statement that the notice is a default notice served under section 87(1) of the Consumer Credit Act 1974;

(b) the information set out in paragraphs 1 to 3, 6 and 8 of Schedule 2 to these Regulations; and

(c) statements in the form specified in paragraphs 4, 5, 7 and 9 to 11 of that Schedule.

(3) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 98(1) of the Act (which relates to the duty to give notice to the debtor or hirer (non-default cases) of termination of an agreement) shall contain -

(a) a statement that the notice is served under section 98(1) of the Consumer Credit Act 1974;

(b) the information set out in paragraphs 1 to 5 of Schedule 3 to these Regulations; and

(c) statements in the form specified in paragraphs 6 to 8 of that Schedule.

(4) The lettering in any notice given under paragraph (1), (2) or (3) above shall, apart from any signature, be easily legible and of a colour which is readily distinguishable from the colour of the paper.

(5) Where any statement is required to be in a form specified in a Schedule to these Regulations and is reproduced in the notice, then apart from any heading to the notice, trade names or names of parties to the agreement -

(a) the lettering in the statement shall be afforded more prominence (whether by capital letters, underlining, large or bold print or otherwise) than any other lettering in the notice; and

(b) where words are both shown in capital letters and underlined in any statement specified in a Schedule to these Regulations, they shall be afforded yet more prominence.

(6) The wording in any such statement shall be reproduced in the notice without any alteration or addition, and in relation to any statement to be contained in the notice the requirements of any note shall be complied with, except that the words "the creditor" may be replaced by the name of the creditor, by the expression by which he is referred to in the agreement or by an appropriate pronoun, and any consequential changes to pronouns and verbs may be used.

(7) Where any note requires any words to be omitted, those words shall be omitted or deleted.

(8) Where a notice is to be given under sections 76(1) and 98(1) of the Act in relation to a regulated agreement, one notice may be given under the two sections reproducing the combined effect of Schedules 1 and 3 to these Regulations.

(9) Sections 76(1), 87(1) and 98(1) of the Act shall not apply in the case of non-commercial agreements in relation to which no security has been provided.

SCHEDULE 1 Regulation 2(1)

FORM OF NOTICE TO BE GIVEN IN NON-DEFAULT CASES BEFORE A CREDITOR OR OWNER CAN BECOME ENTITLED TO ENFORCE A TERM OF A REGULATED AGREEMENT BY DEMANDING EARLIER PAYMENT OF ANY SUM, RECOVERING POSSESSION OF ANY GOODS OR LAND OR TREATING ANY RIGHT CONFERRED ON THE DEBTOR OR HIRER BY THE AGREEMENT AS TERMINATED, RESTRICTED OR DEFERRED

Details of agreement

1. A description of the agreement sufficient to identify it.

Parties to agreement

2. - (1) The name and a postal address of the creditor or owner.

(2) The name and a postal address of the debtor or hirer.

Term of agreement to be enforced

3. The term of the agreement to be enforced, or a reference to and a short description of that term.

Action intended to be taken by creditor or owner

4. A clear and unambiguous statement by the creditor or owner indicating -

(a) which (one or more) of the following types of action he intends to take, in order to enforce the term of the agreement, -

(i) to demand earlier payment of any sum;

(ii) to recover possession of any goods or land;

(iii) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred;

(b) the manner and circumstances in which he intends to take such action; and

(c) the date, being a date not less than seven days after the giving of the notice, on or after which he intends to take such action.

Demanding earlier payment of any sum

5. Where the creditor or owner states that he intends to demand earlier payment of any sum,

(a) the amount of the sum before deducting the amount of any rebate on early settlement;

(b) where any rebate on early settlement is allowable under the agreement or by virtue of section 95 of the Act -

(i) the amount of the rebate allowable calculated on the assumption that early settlement takes place on the date specified in the notice for earlier payment of the sum; and

(ii) the total amount to be paid by the debtor after taking into account the amount of any rebate on early settlement, namely the difference between the amount shown in paragraph (a) above and the amount shown in sub-paragraph (i).

Time order

6. A statement in the following form indicating that the debtor or hirer is entitled to apply under section 129 of the Act in England and Wales to the county court, in Scotland to the sheriff court or in Northern Ireland to the High Court or the county court for a time order -

"IF YOU HAVE DIFFICULTY IN PAYING ANY SUM OWING UNDER THE AGREEMENT YOU CAN APPLY TO THE COURT WHICH MAY MAKE AN ORDER ALLOWING YOU OR ANY SURETY MORE TIME".

General

7. A statement in the following form -

"IF YOU ARE NOT SURE WHAT TO DO, YOU SHOULD GET HELP AS SOON AS POSSIBLE. FOR EXAMPLE YOU SHOULD CONTACT A SOLICITOR, YOUR LOCAL TRADING STANDARDS DEPARTMENT OR YOUR NEAREST CITIZENS' ADVICE BUREAU".

8. A statement in the following form -

"IMPORTANT - YOU SHOULD READ THIS CAREFULLY".

Regulation 2(2) **SCHEDULE 2**

FORM OF DEFAULT NOTICE BEFORE A CREDITOR OR OWNER CAN BECOME ENTITLED, BY REASON OF ANY BREACH BY THE DEBTOR OR HIRER OF A REGULATED AGREEMENT, TO TERMINATE THE AGREEMENT, DEMAND EARLIER PAYMENT OF ANY SUM, RECOVER POSSESSION OF ANY GOODS OR LAND, TREAT ANY RIGHT CONFERRED ON THE DEBTOR OR HIRER BY THE AGREEMENT AS TERMINATED, RESTRICTED OR DEFERRED OR ENFORCE ANY SECURITY

Details of agreement

1. A description of the agreement sufficient to identify it.

Parties to agreement

2. - (1) The name and a postal address of the creditor or owner.

(2) The name and a postal address of the debtor or hirer.

Details of breach of agreement and action required to remedy, or pay compensation for, the breach

3. A specification of:-

(a) the provision of the agreement alleged to have been breached; and

(b) the nature of the alleged breach of the agreement, specifying clearly the matters complained of; and either

(c) if the breach is capable of remedy, what action is required to remedy it and the date, being a date not less than seven days after the date of service of the notice, before which that action is to be taken; or

(d) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach and the date, being a date not less than seven days after the date of service of the notice, before which it is to be paid.

Action by the creditor or owner to be ineffective if breach remedied or compensation paid

4. Where any action is specified under paragraph 3(c) or (d) as required to be taken, a statement that the privision for the taking of any action by the creditor or owner such as is mentioned in paragraph 6 will be ineffective if the breach is duly remedied or the compensation is duly paid in the following form -

"IF THE ACTION REQUIRED BY THIS NOTICE IS TAKEN BEFORE THE DATE SHOWN NO FURTHER ENFORCEMENT ACTION WILL BE TAKEN IN RESPECT OF THE BREACH".

Note:

This statement shall follow the specification under paragraph 3(c) or (d) of any action required to be taken.

Consequences of failure to comply with default notice

5. Where any action is specified under paragraph 3(c) or (d) as required to be taken, a statement indicating the consequences of the failure by the debtor or hirer to comply with the default notice in the following form -

> "IF YOU DO NOT TAKE THE ACTION REQUIRED BY THIS NOTICE BEFORE THE DATE SHOWN THEN THE FURTHER ACTION SET OUT BELOW MAY BE TAKEN AGAINST YOU [OR A SURETY]".

Notes:

1. This statement shall be followed by the specification under paragraph 6 of the further action intended to be taken by the creditor or owner.

2. Creditor or owner to omit words in square brackets if there is no specification under paragraph 6(e) of any action intended to be taken to enforce any security.

Action intended to be taken by creditor or owner

6. A clear and unambiguous statement by the creditor or owner indicating, if any action specified under paragraph 3(c) or (d) as required to be taken is not duly taken or if no such action is required to be taken, the action which he intends to take by reason of the breach by the debtor or hirer of the agreement -

(a) to terminate the agreement;

(b) to demand earlier payment of any sum;

(c) to recover possession of any goods or land;

(d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred;

(e) to enforce any security;

(f) to enforce any provision of the agreement which becomes operative only on a breach of another provision of the agreement as specified in the notice,

at any time on or after the date specified under paragraph 3(c) or (d), or, if no action is specified under that paragraph as required to be taken, indicating the date, being a date not less than seven days after the date of service of the notice, on or after which he intends to take any action indicated in this paragraph.

Retaking of protected hire-purchase etc., goods

7. In the case of a regulated hire-purchase or conditional sale agreement relating to goods, where the property in the goods remains in the creditor, a statement in the following form -

"BUT IF YOU HAVE PAID AT LEAST ONE-THIRD OF THE TOTAL AMOUNT PAYABLE UNDER THE AGREEMENT SET OUT BELOW (OR ANY INSTALLATION CHARGE PLUS ONE-THIRD OF THE REST OF THE AMOUNT PAYABLE), THE CREDITOR MAY NOT TAKE BACK THE GOODS AGAINST YOUR WISHES UNLESS HE GETS A COURT ORDER. (IN SCOTLAND, HE MAY NEED TO GET A COURT ORDER AT ANY TIME.) IF HE DOES TAKE THEM WITHOUT YOUR CONSENT OR A COURT ORDER, YOU HAVE THE RIGHT TO GET BACK ALL THE MONEY YOU HAVE PAID UNDER THE AGREEMENT SET OUT BELOW".

Note:

This statement shall follow the specification under paragraph 6 of the further action intended to be taken by the creditor or owner and be followed by -

(a) either

(i) the total amount payable under the agreement, or

(ii) where there is an installation charge, separately, the amount of the installation charge and the rest of the total amount payable under the agreement; and

(b) the total amount that the debtor has paid to the creditor by the date of the giving of the notice.

Requiring earlier payment of any sum

8. Where a sum of money is required to be paid under the notice.

(a) the amount of the sum before deducting the amount of any rebate on early settlement;

(b) where any rebate on early settlement is allowable under the agreement or by virtue of section 95 of the Act -

(i) the amount of the rebate allowable calculated on the assumption that early settlement takes place on the date specified in the notice for earlier payment of the sum; and

(ii) the total amount to be paid after taking into account the amount of any rebate on early settlement, namely the difference between the amount shown in paragraph (a) above and the amount shown in sub-paragraph (i).

Time order

9. A statement in the following form indicating that the debtor or hirer is entitled to apply under section 129 of the Act in England and Wales to the county court, in Scotland to the sheriff court or in Northern Ireland to the High Court or the county court for a time order -

"IF YOU HAVE DIFFICULTY IN PAYING ANY SUM OWING UNDER THE AGREEMENT OR TAKING ANY OTHER ACTION REQUIRED BY THIS NOTICE, YOU CAN APPLY TO THE COURT WHICH MAY MAKE AN ORDER ALLOWING YOU OR ANY SURETY MORE TIME".

General

10. A statement in the following form -

"IF YOU ARE NOT SURE WHAT TO DO, YOU SHOULD GET HELP AS SOON AS POSSIBLE. FOR EXAMPLE YOU SHOULD CONTACT A SOLICITOR, YOUR LOCAL TRADING STANDARDS DEPARTMENT OR YOUR NEAREST CITIZENS' ADVICE BUREAU".

11. A statement in the following form -

"IMPORTANT - YOU SHOULD READ THIS CAREFULLY".

Regulation 2(3) **SCHEDULE 3**

FORM OF NOTICE TO BE GIVEN IN NON-DEFAULT CASES BEFORE A CREDITOR OR OWNER CAN BECOME ENTITLED TO TERMINATE A REGULATED AGREEMENT

Details of agreement

1. A description of the agreement sufficient to identify it.

Parties to agreement

2. - (1) The name and a postal address of the creditor or owner.

(2) The name and a postal address of the debtor or hirer.

Term of the agreement providing for termination

3. The term of the agreement providing for termination of the agreement by the creditor or owner, or a reference to and a short description of that term.

Action to terminate the agreement

4. A clear and unambiguous statement by the creditor or owner -

(a) indicating that by the giving of the notice he is terminating the agreement and indicating any steps that he intends to take to effect the termination or, as the case may be, indicating the manner and circumstances in which he intends to take action to terminate the agreement; and

(b) indicating the date, being a date not less than seven days after the giving of the notice, of the termination or, as the case may be, the date on or after which he intends to take action to terminate the agreement.

Rights and liabilities arising by reason of the termination of the agreement

5. Any right or liability that will arise by reason of the termination of the agreement and the date by which the right or liability will arise, including -

(a) the amount of any sum payable by the debtor or hirer before deducting the amount of any rebate on early settlement;

(b) where any rebate on early settlement is allowable under the agreement or by virtue of section 95 of the Act -

(i) the amount of the rebate allowable calculated on the assumption that early settlement takes place on the date specified in the notice for earlier payment of the sum; and

(ii) the total amount to be paid by the debtor after taking into account the amount of any rebate on early settlement, namely the difference between the amount shown in paragraph (a) above and the amount shown in sub-paragraph (i).

Time order

6. A statement in the following form indicating that the debtor or hirer is entitled to apply under section 129 of the Act in England and Wales to the county court, in Scotland to the sheriff court or in Northern Ireland to the High Court or the county court for a time order -

"IF YOU HAVE DIFFICULTY IN PAYING ANY SUM OWING UNDER THE AGREEMENT, YOU CAN APPLY TO THE COURT WHICH MAY MAKE AN ORDER ALLOWING YOU OR ANY SURETY MORE TIME".

General

7. A statement in the following form -

"IF YOU ARE NOT SURE WHAT TO DO, YOU SHOULD GET HELP AS SOON AS POSSIBLE, FOR EXAMPLE YOU SHOULD CONTACT A SOLICITOR, YOUR LOCAL TRADING STANDARDS DEPARTMENT OR YOUR NEAREST CITIZENS' ADVICE BUREAU".

8. A statement in the following form -

"IMPORTANT - YOU SHOULD READ THIS CAREFULLY",

APPENDIX D

The Local Authorities (Disposal of Mortgages)

Regulations 1986 S.I. 1986 No. 1028

The Local Authorities (Disposal of Mortgages) Regulations 1986 S.I. 1986 No. 1028

Citation, commencement and application

1. - (1) These regulations may be cited as the Local Authorities (Disposal of Mortgages) Regulations 1986 and shall come into operation on 21st July 1986.

(2) These regulations apply to the disposal on or after 1st September 1986 of a local authority's interest as mortgagee of any land under any description of mortgage, other than a disposal which is carried out in pursuance of a contract entered into before 1st April 1986.

Interpretation

2. In these regulations -

"the Act" means the Local Government Act 1986;

"intended transferee" means the person to whom a local authority intend to dispose of their interest as mortgagee of any land; and

"prospective disposal" means the prospective disposal by a local authority to the intended transferee.

Information to be given to mortgagors

3. A local authority shall give to a mortgagor whose consent is sought for the purposes of section 7 of the Act, written information as to -

(1) the name and address of the intended transferee and also, where the intended transferee is a company, the name and address of any holding company;

(2) the effect which the prospective disposal is likely to have on -

(a) the rate of interest applicable to the mortgage;

(b) the way in which that rate is determined; and

(c) the places at which and the methods by which amounts payable under the mortgage may be paid;

(3) the policy of the intended transferee with regard to mortgagors who are in arrears or default and a comparison of such policy with the policy of the local authority in relation to those matters;

(4) the right of the mortgagor under section 7(2)(a) of the Act to withdraw his consent, the way in which consent may be withdrawn, and the fact that, to be effective, notice of the withdrawal must be given before the disposal is made;

(5) the right of a mortgagor who does not wish to give his consent to the transfer of his mortgage to take no further action; and the fact that a mortgagor who takes no further action will not be treated as having given his consent to the transfer; and

(6) the right of the mortgagor (and others) under section 7(5) of the Act to require the local authority (and others) to undo a disposal and the steps to be taken by a mortgagor who wishes to exercise that right.

Form of consent

4. A consent for the purposes of section 7 of the Act shall be given in the form set out in the Schedule to these regulations.

Notification of disposal

5. A local authority shall secure that notice of the fact that they have disposed of their interest as mortgagee of any land shall be given to the mortgagor no later than 7 days after the date of the disposal.

SCHEDULE **Regulation 4**

LOCAL GOVERNMENT ACT 1986
CONSENT TO TRANSFER OF MORTGAGE

IMPORTANT:- Please read the information sent with this form. If you sign this form you will be giving your consent to the transfer of your mortgage from the local authority to the organisation named below. Your consent will remain valid for six months but you may withdraw it at any time before the transfer takes place by writing to the local authority. Further details are given in the information which accompanied this form.

If you do not wish to give your consent, do not sign this form. You do not need to take any further action.

All the present owners named below must consent before the mortgage can be transferred. If they sign on different dates, the six month period will run from the date of the earliest signature. The mortgage may be transferred as soon as consent has been obtained from all the people whose consent is required.

Notes: Items marked * must be completed by the local authority before the form is sent to the mortgagor(s). Items within square brackets must be completed or, if inapplicable, deleted by the local authority before the transfer is effected.

[Title number (if registered):]

* Address of property:

* Full name(s) of mortgagor(s) (being the present owner(s) of the property):

I/We, the above-named mortgagor(s) hereby consent to the mortgage in favour of *

[dated]
[and registered on] being transferred to*

Signed ..... Date .....

Signed ..... Date .....

Signed ..... Date .....

Signed ..... Date .....

Printed in the UK for HMSO by Hobbs the Printers of Southampton
(2667/86) Dd239978 C14 9/86 G3379